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IN THE

Supreme Court of the United States

October Term, 1945.

CHARLES A. KOZA, JOHN A. ANDERSON and INVINCIBLE TOOL CO., INC.,

Petitioners,

vs.

CHARLES DREXLER and CHARLES DREXLER CO., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BATAVIA TIMES, LAW PRINTERS,
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IN THE

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CHARLES A. KOZA, JOHN A. ANDERSON and INVINCIBLE TOOL CO., INC.,

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vs.

CHARLES DREXLER and CHARLES DREXLER CO., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Charles A. Koza, John A. Anderson and Invincible Tool Co., Inc. pray that a writ of certiorari issued to the United States Circuit Court of Appeals for the Third Circuit, which Court on July 1, 1946 entered an order dismissing an appeal by the Petitioners, Charles A. Koza, John A. Anderson and Invincible Tool Co., Inc., which Court also sustained the decision of the Lower Court which decision of the Lower Court held in substance that the Drexler patent, sued on by Respondents, #2,147,832 was valid and infringed and held that Charles Drexler was

the inventor thereof and held that Charles A. Koza, Petitioner was not the inventor thereof and held that Charles A. Koza did not disclose the invention thereof to Charles Drexler as alleged in the answer and dismissed Koza's counterclaim which alleged that there was confidential relations between the Petitioner, Charles A. Koza and the Respondent, Charles Drexler, the Courts holding in substance that there was no confidential relations between the parties.

Jurisdictional Statement.

Jurisdiction of the Court is invoked under U. S. Code, Title 28, Sec. 41 paragraph 7 of the Judicial Code, which gives to the Courts of the United States jurisdiction of all suits at law or in equity arising under the patent laws and Section 41, paragraph 1 of the same judicial code which gives jurisdiction to all suits of a civil nature at common law or inequity between citizens of different states, it being understood that the Respondents (Drexler) are citizens of Indiana and Petitioners (Koza) are citizens of Pennsylvania and being citizens of different States, the Court has jurisdiction under Section 41 aforesaid, and the Court further has jurisdiction under Rule 38 of the Revised Rules of the Supreme Court of the United States, which Rule in substance reads as follows:

> 5b. "Where a Circuit Court of Appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of Federal Law which has not been, but should be settled by this Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this Court or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision".

Petitioner alleges that both the Lower Court and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to warrant the Supreme Court to exercise its power of supervision and its sound judicial discretion.

I. Summary and Short Statement of the Matter Involved.

Patent #2,147,832 was issued to Charles Drexler, one of the plaintiffs, of Indianapolis, Indiana, on February 21, 1939 on an angle driving mechanism. This patent has been assigned to Charles Drexler Company, Inc., the other plaintiff. This patent was applied for May 7, 1938. Charles Drexler *et al.* has sued Charles A. Koza *et al.* alleging infringement of this patent. Charles A. Koza one of the defendants, applied for a patent on a similar type of device on January 7, 1939 and was issued Patent #2,229,509 on January 21, 1941. The exclusive rights to manufacture the patented article are now owned by Invincible Tool Company, Inc., the second defendant.

Originally, one John A. Anderson was a party defendant but by proper proceedings and by decree of the District Court, Anderson was eliminated from the litigation and Invincible Tool Co., Inc., was made party to the litigation before trial.

Beginning on February 19, 1945, a hearing was held on Complaint and answer before Honorable Robert M. Gibson, District Judge. The testimony was taken that day and the following day, and on October 4, 1945, Judge Gibson filed his Opinion, Findings of Fact, Conclusions of Law and Discussion.

The decision of the District Court is found at 62 F. S. 473 and of the Court of Appeals 3rd Circuit has not yet been printed in F. 2nd.

On November 5, 1945, after due notice, a judgment against the defendant's counterclaim and a decree sustaining the claims of the plaintiff was entered, together with a permanent injunction restraining the defendant from infringing upon the several claims of the patent. November 20, 1945, Notice of Appeal was filed, together with a proper appeal bond.

This litigation involves what are known in the trade as angle drills. The device is designed in such a way that the tool may be attached to any power source such as an electric motor, by a flexible cord, the power passing through a central driving mechanism in the tool itself and coming out at a 45° angle or a 90° angle or at any other required angle from the direction of the axis of the driving mechanism at the power end of the tool. The change in the direction of the power is achieved by two gears placed at the necessary angle to each other, both of the gears, the driving mechanism and the driven mechanism being housed in a tube which is also used as the handle by which the tool is manipulated by the operator.

Drexler's patent consisted of the placing of the single steel ball in the angle between the apices of the gears, the ball being large enough to contact with the apex of each gear and with the housing. The purpose of the ball was to prevent the gears from getting out of position with relation to each other, thus preventing friction and rapid wearing out of the tool. The tool was designed for high speed operation, as high as 10,000 R. P. M. or even higher.

Koza's tool differed from Drexler's tool in that there was inserted at the apex of the angle of the tube of the tool

a hard steel screw bearing which was adjustable in position so that any wear on the ball or the contact points at the apex of either gear could be taken up by adjustment of the screw. His tool had a single ball bearing the same as Drexler's, which was placed in the same position with respect to the two gears. There is no provision for adjustments to take up wear in the Drexler patent.

Drexler brought this suit in behalf of himself and his co-plaintiff against Koza and others claiming an infringement of his, Drexler's patent.

Koza for himself and for the Invincible Tool Company, defended on the ground that the invention which Drexler claimed was rightfully and lawfully the property of Koza, because he, Koza had disclosed the invention to Drexler at Indianapolis, Indiana, in November or December, 1937, long prior to the granting of the patent to Drexler. Koza testified that he disclosed the invention to Drexler in confidence by showing Drexler Exhibit "A", and by sketching a ball thereon between the two gears as will be explained later, and he claims that the disclosure of the blueprint, Exhibit "A" and/or Exhibit "A" with the ball sketched thereon created a confidential relation between them, so that when Drexler applied for and secured a patent, he violated and abused this confidential relation to his own great profit, all of which profits Koza claimed to be rightfully his. Koza also demanded an accounting of these profits and requested a mandatory injunction requiring Drexler and his assignee to assign the patent to him.

The District Court had exclusive jurisdiction of the litigation involving the title to the patent and the infringement of either patent. That part of Koza's counterclaim which is based on the common law and equitable prin-

ciples was properly litigated before that court because of diversity of citizenship.

Koza was born in 1891, did not graduate from high school but attended a mechanics institute in Rochester, New York for a time. He served in the United States Army from 1910 to 1913, and afterwards attended the night school at Carnegie Institute of Technology at Pittsburgh for some time, but did not secure a degree. (68 a.) He first became interested in angle tools in 1926 or 1927. (73 a.)

Sometime in 1935, Koza was at the Puget Sound Navy Yard on the West Coast and there saw a heavy angle drill that was being used on destroyer work. It was too large for the purposes suggested by the Navy Yard at Philadelphia, and he endeavored to design an angle drill that would be small enough for the confined spaces around airplane structural work. On September 6, 1936, he made a drawing at Hartford, Connecticut, which is Exhibit "B", and made some blueprints of this drawing, one of which is Exhibit "A". On September 16, 1936 Koza had his signature to this drawing witnessed by Eric Ischinger, a patent attorney. This drawing, Exhibit "B", provided for a race of small balls located at the apex of the driven gear, held in place by a race at the end of a stud, the surface of which was parallel to the plane of the face of the gear. No angle drills were made according to this drawing until it was shown to Drexler. Exhibits "A" and "B" show Koza's own design of an angle drill and it was a secret with Koza. Drexler was bound to respect Koza's secret.

On September 28, 1936, Koza made a drawing, Exhibit "U", while in Baltimore, Maryland, which shows a single ball used as a thrust bearing for the two angle gears. The thrust of the gears on the ball was taken up by two screws.

Koza said that this tool "was impractical for a tool of the size necessary for aircraft work. You could not get two screws in a housing of five-eighths or one-half inch diameter." (98 a, 99 a.)

Some time in this period between 1935 and December, 1937, Koza had made for him some 25 or 50 angle tools, most of which he sold. (72 a, 73 a.) It was found that these tools were not completely satisfactory because the gears were cut with straight teeth and running at such high speed generated a lot of heat and wore out very rapidly, developing a tendency to more or less push out of mesh. (72 a.)

For some years before 1937, Koza had been acting as a manufacturer's agent for a number of types and kinds of mechanical tools. He traveled a great deal up and down the United States taking orders, discussing the wants of the various manufacturers and the needs of factories where various products were made. All of the tools which he handled were highly specialized. He himself had designed and devised variations of these tools for particular work and had devised a few tools *in toto,* for some of which he had applied for a patent. (67 a.)

In the regular course of his business Koza called at Drexler's Machine Shop at Indianapolis, Indiana early in the month of December, 1937. Drexler was not there. His draftsman, Ralph Morgan was in the office and was in charge. Koza introduced himself and asked about the possibilities of Drexler's buying some of the tools which Koza was trying to sell. During the course of an ordinary business conversation Koza found that Drexler had in his shop a highly specialized machine known as a Gleason Gear Generator. This machine would cut gears of almost any type with involute teeth. Koza knew that this type of gear

with involute teeth was the best known to the art and suggested to Morgan that he was looking for a man to make for him very small bevel gears for use in an angle drill. After some conversation, an engagement was made to meet Drexler at the shop the next day.

Here it may be said that at that time Drexler was running a job shop and he made gears. His letterhead is in evidence and contained the following legend:

"DESIGNERS & MANUFACTURERS OF GEARS, SPECIAL MACHINERY & DEVICES."

Koza called the next day and before Drexler appeared he showed Morgan the blue print, Exhibit A, which is a blue print from a drawing of an angle drill that was designed and drawn by Koza on September 6, 1936, and of which up to that time; namely, December, 1937, no samples of drills of this design had been made by Koza. The drawing shows miter or bevel gears.

See page 77 a where Koza said:

"I never had any tools made to this blue print at all."

The prototype of this drill, Koza had seen at the Puget Sound Navy Yard, but the drill there was so large and objectionable otherwise, that Koza redesigned it. His design was smaller than what he had seen on the Pacific Coast and differed from it in other particulars. Koza made it so it could be used on airplane structural work (p. 80 a).

While talking with Morgan about the design of the tool appearing on Exhibit "A", Koza took a pencil from the drawing board and drew a crude circle between the apices of the gears as they were shown on Exhibit "A" and asked Morgan what he thought of placing a single ball in the position indicated by the pencil mark (bottom of page 80 a).

Drexler and Morgan deny this suggestion of the ball by Koza or at least they do not admit it.

Referring again to what happened in December, 1937, Drexler's own testimony at pages 22 a and 23 a reads as follows:

> "He, (Koza) confided in Mr. Morgan that he was looking for a source to manufacture an angle drill attachment to take care of the aviation trade and he told Mr. Morgan and showed him what he had in mind."
>
> (Note the use of the word confided.)

Morgan, who was Drexler's draftsman, testified at page 139 a as follows:

> "Q. To the best of your recollection, this particular paper here that is marked as Exhibit A is the same one you saw?
>
> A. Yes, sir.
>
> Q. And up until that time, neither you nor Drexler had been interested in angle drills in any shape, manner or form, buying, or making or selling them?
>
> A. No, sir.
>
> Q. And you had never designed an angle drill before that time?
>
> A. No, sir."

The details of the conversation between Drexler and Koza with respect to this tool will be discussed at length hereafter. As a result of these conversations Koza went on about his business elsewhere with the assurance by Drexler that he would work out for Koza a redesigned tool.

On or about January 24, 1938, Koza again appeared at Drexler's shop. He was there shown a drawing, Exhibit "Q", which was in most detail a working drawing of the angle tool very much the same as Koza's Exhibit "A", except that it had the ball at the angle between the two bevel gears in which respect it was the same as the drawing of the Drexler patent in suit. There was a long discussion about

the cost of manufacturing the drill and about Koza selling the drill to the trade. There was discussion of the financial arrangements and how tools sold should be delivered and paid for by the purchasers.

On or about January 24, 1938 the price of these drills to Koza was fixed at $10.00 for the first hundred and thereafter the price was to be $7.50 each. This was to amortize the cost of tooling. This is set forth in Drexler's own testimony at page 125 a as follows:

"Q. And at that time the first price you ever gave to Mr. Koza was $10 no more no less. Is that right?
A. My price to him was $10 on the first hundred, and amortize the tooling.
Q. And that was the first price you ever quoted to him?
A. That is right.
Q. And the only price you ever quoted to him, except in quantities?
A. After the hundred it was $7.50.
Q. All right. The only price you ever quoted to him on the first one hundred of any of these tools was $10?
A. $10 each.
Q. And you did that as early as January 24th?
A. * * * I would say around January 24th."

The Century Dictionary defines "Amortize": "To extinguish as a debt, by means of a sinking fund."

The price of $10 for the first one hundred and $7.50 thereafter made a difference of $250 on the first hundred which was charged to the cost of the tools. It was illogical or dishonest for Drexler in January 1938 to charge Koza $250 for amortizing the cost of the tools, unless the tools were to belong to Koza and this in turn indicates that the patent was to be taken out by Koza. The fact that it was agreed that the cost of the tools were charged to Koza in January 1938 shows that there was an understanding at that time that Koza had made the invention and would own the patent.

About February 18, 1938, Koza started on a long selling trip to the West Coast.

Before Koza started to the coast he prepared a circular, with the approval of Drexler, advertising this new tool to the trade. A copy of the advertisement, which was largely a typewritten statement of the various specifications of the tool was sent to most of the airplane manufacturers in the United States and one of the original circulars was in evidence as Exhibit "I" (288 a). This particular one had been received by Bell Aircraft Co. on February 14, 1938.

It was entitled:

> "Specifications for Koza—45 and 90 Degree Geared Drive—Round Type Angle Drills."

Advertisement, Exhibit "G" announces:

> "KOZA ANGLE TOOL ATTACHMENTS".

Neither of them mentions Drexler.

These advertisements were made with Drexler's consent and bind Drexler.

Sometime in March 1938, Koza received at Los Angeles the first finished tool that Drexler had made. Because of the depression in 1938, Koza received orders for only about twenty-five angle drills in all (111 a).

On March 29, 1938, Drexler wrote to Koza as follows:

> "I had a patent search made in the section that RIGHT ANGLE DRILL AND DEVICES come under and so far find that our type of a design is patentable."

The use of the word "our" in this letter two months after January 24 is significant. If this was Drexler's invention he would have said "*my* type of a design is patentable," or better still, would not have mentioned the subject at all, because if it was invented by Drexler it would be no concern to Koza.

Drexler's patent was applied for May 7, 1938; thirty-nine days after the letter of March 29. No attorney appears in connection with the Drexler application; yet Drexler could not have written the specification and claims because they were written with great accuracy and no objection was made to them by the Patent Office.

According to Koza's testimony, Koza should have signed the application, but Koza was on the west coast and was living from hand to mouth, (87 a), and Drexler knew it; so Drexler signed the papers instead. Did the attorney that prepared the papers refuse to appear in the application?

In his letter to Koza of September 21, 1938 (285 a) Drexler wrote:

> "I have not been able to get a satisfactory credit report on you."

He said the same thing in his testimony at page 56 a.

Drexler applied for his patent May 7, 1938 and thereafter his relations with Koza became oppressive. Koza was like the Master who let his camel stick his nose in his tent and later was driven out by the camel.

When Koza paid $7.50 net for the angle drills, he in turn could bill them out for $15.00 and did so (bottom of page 85 a and top of page 86a) BUT when Drexler insisted on billing to the customer direct at $10.00 each (Exhibit "M" —(295 a) it destroyed the agreement of January and made it impossible for Koza to give commission to agents. He cut Koza's commission to 10%. Koza complained about this in his letter of September 5, 1938. At the bottom of page 297 a he asked why Drexler charged $25.96 for the flexible shaft job when Koza had paid $8.00 for them elsewhere. Drexler's telegram of September 6, (page 298 a) insisted on the conditions of Exhibit "M" and this put Koza out of the business.

Until July 1938, Koza was on the Pacific Coast and during that time there was considerable correspondence between Drexler and Koza with respect to the manufacture and delivery of angle drills.

Under date of April 21, 1938, Drexler wrote to Koza at Los Angeles that "we are making application for a patent." Koza then wrote a letter Exhibit 17, 205 a under date of May 28, 1938, from San Francisco in which he said, "Tell me frankly where I fit into this picture in regard to the patent situation." In answer to that inquiry, Drexler wrote him a letter (Exhibit "J") at Seattle, dated June 2, 1938, in which he said:

> "In regard to the patent on this tool, it is our opinion that any claims that will be allowed should be the property of the Charles Drexler Company, as we conceived the idea and stood all of the expense of the development."

At the end of the same letter Drexler wrote:

> "As you were the party that interested us in getting into this business I want to continue to be fair with you, as I have in the past."

Koza waited for several months, giving Drexler ample opportunity to show his fairness to Koza, but no fairness was ever shown.

Sometime during the summer of 1938, the blue print, Exhibit "A", was returned to Koza at his request and it was put in evidence.

After Drexler applied for the patent in his own name, he said nothing more about charging the cost of the tools to Koza or amortizing the cost of them. After that, his intention was to own the whole thing.

At the trial there was offered in evidence a letter dated September 24, Exhibit 24 (385 a), and another dated Sep-

tember 30, Exhibit 25 and an unopened registered letter, delivery of which was refused by Koza, Exhibit 26. There was no other communication between the parties until September 28, 1939, when Koza wrote to Drexler. This will be referred to later.

Koza filed his application January 23, 1939. Drexler's patent issued February 21, 1939. The Patent Office should have withheld Drexler's patent and declared an Interference with Koza as required by Rule 96 of the Patent Office, but it issued the Drexler patent without doing this. This was the mistake of the Patent Office and it worked fatally to the prejudice of Koza, because the Patent Office could not cancel the patent even if Koza won the Interference. In March 1939, Drexler could sue Koza for Infringement and Koza could not sue Drexler, except for breach of confidence.

Koza could have copied Drexler's claims and gone into Interference with the patent, but that meant an Interference in the Patent Office, which would have cost Koza over $1,000.00 and the fact that Drexler's patent was issued made it more difficult for Koza to get assistance; so he avoided the Interference.

On September 28, 1939 Koza wrote a letter to Drexler, claiming the invention as his own (229 a). He said in part as follows:

> "This was my invention and not your invention"

He then described just how he had made the disclosure to Drexler in December 1937. He also said as follows:

> "It has been suggested to me that as a practical solution of this situation, we can compromise by your assigning a half interest of your patent to me with suitable restrictions.
>
> If we can get together on such a basis, I can make contributions to the development of the art that will be worthwhile to both of us."

This letter was not answered and ended the correspondence.

If Drexler had assigned a half interest to Koza, he could not thereafter have sued Koza for an infringement of the patent and if Koza was the inventor he was entitled to this protection and this proposal was entirely consistent with the Supreme Court decision, Becher vs. Contoure Labs., 279 U. S., 388, 73 L. Ed. 752 in which the Court in substance sustained the state court in ordering the assignment of a patent that was invalid. But Koza was poor and Drexler knew it.

If Koza and Drexler had got together to that extent, Koza could have copied the claims under a stipulation or the concession of priority by Drexler in which the broad claims would have issued in Koza's patent, thereby extending the monopoly in a patent that showed an improvement over Drexler's patent because it contained the adjustment. There was no unclean hands in this suggestion.

More will be said about this later.

II. Errors Assigned.

1. The opinion of the Court of Appeals of the Third Circuit does not review the evidence, is but eleven printed lines long and ends with the statement:

> "We cannot say that his conclusion was clearly erroneous. The judgment is affirmed."

Koza submits this is error.

2. Koza has put in evidence Exhibit "A" which is a blueprint showing an angle drill having two bevel gears therein with ball bearing for each gear. By way of showing that this was old in the prior art, Drexler put in evidence sixteen prior patents that were not pleaded and of

which no notice were given. Koza objected to the introduction of these patents on the ground that they were irrelevant and immaterial and on the ground that Drexler owed all of his information that got him started in the angle drill business to Koza's disclosure. The Court overruled the objection saying:

"I can't see it matters one way or the other."

All or nearly all of these patents show angle wrenches. The handles for operating them appear in the drawings of nearly all the patents. The Court in its sixth Finding of Fact declares that such angle tools, referring to Exhibit "A," have been commonly employed and known to the trade prior to the invention of the patent in suit, etc. There is no evidence of such prior knowledge or use. The Court cited two of these hand operated wrenches as prior art in Finding 6; namely, the patents to Sadtler #1,199,823 and Klopper #1,420,635 showing that in his opinion it did matter. Both of these patents show hand operated angle wrenches with handles for operating them. None of these wrenches shown in the sixteen patents show angle drills or power drives or ball bearings. They are all turned slowly and intermittently by hand. Koza testified that angle drills rotate at from 1700 R. P. M. to 17,000 R. P. M. (95 a). This requires a power drive.

The patents belong to a non-analogous art and are irrelevant and immaterial because of the practice set forth in

Potts vs. Creager, 155 U. S. 597, 39 L. Ed. 275.

Topliff vs. Topliff, 145 U. S. 156, 36 L. Ed. 658.

This is error.

The citation of a large number of references has been repeatedly condemned by the Courts.

Hoeltke vs. Kemp, 80 F. (2d) 912, 917.

Binney & Smith vs. United, 125 F. (2d) 255.

(3) The Lower Courts erred in failing to hold that Drexler, on or about January 24, 1938, agreed to furnish the first hundred angle drills to Koza at $10 each and that thereafter he agreed to furnish the drills at $7.50 each, the difference of $2.50 on each of the first one hundred drills, (namely, a total of $250) being used to amortize the tooling needed to make the drills in quantities and that Drexler so testified (125 a) his answers reading as follows:

"A. My price to him was $10 on the first hundred, and amortize the tooling."

"A. After the hundred it was $7.50."

"A. We * * * made tools and bought forging dies and forgings and started the manufacture" (25 a).

"A. I had to buy the forgings." (125 a.)

The necessary inference was that Koza was to be charged with the cost of the tools and was to own the tools which tools Koza could not use unless he held the patent. This indicates that on January 24, 1938, the parties agreed that Koza was the inventor and was to file the application for patent. (See Koza's testimony 88 a and 102 a.) Drexler went back on this agreement and filed the application in his own name. This was fraud. The Lower Courts failed to recognize this. This is error.

The Lower Courts erred in failing to apply the law in four particulars.

(4) The Courts failed to apply the decision of DuPont vs. Masland, 244 U. S. 100 to the foregoing facts of this case. In that case the Supreme Court held in substance that the defendant who had been employed by DuPont's could not question the novelty of the disclosure which he received from their employer. Any disclosure that the employee received from the employer was confidential and established confidential relations between them.

In the case at bar, Koza was the employer and Drexler was the employee to whom Koza showed Exhibit "A" for the purpose of starting his dealings with Drexler, Drexler would never have known about angle drills and would never have patented or made angle drills, and would never have gotten into the business of making angle drills. Koza got Drexler into the business. Drexler said so in substance in his letter of June 2, 1938 quoted above. This is error.

(5) The Courts failed to apply the rule established in Flather vs. Weber, 21 App. D. C. 179, 1903 C. D. 561 and Alexander vs. Blackman, 26 App. D. C. 541, 1906 C. D. 602 in which the Courts held that where there is a dispute as to the origin of an invention the presumption is that the invention originated with the man who is experienced in the art.

The facts of this case show that Koza was experienced in the art of angle drills and ball bearings and Drexler admitted that he knew nothing about angle drills, and the evidence does not show that Drexler knew anything about ball bearings. This is error.

This presumption has long been observed by the Patent Office and its Appellate Courts and it is believed that it should now be recognized by the Supreme Court and made of general application in patent cases.

(6) The Courts failed to apply the rule established in Gallagher vs. Hastings, 21 App. D. C. 88, 1903 C. D. 531 and other decisions to the effect that where a man runs a job shop and holds himself out to the trade for its patronage, the presumption is that he received the general plan or conception of the invention from his customer and merely perfected it. He must help and must not double cross his customer.

This presumption has long been observed by the Patent Office and its Appellate Courts and it is believed that it should now be recognized by the Supreme Court and made of general application in patent cases. Both of these presumptions should be applied in this case because of the special circumstances existing here.

If the tools ($250) were to be charged to Koza, it must have been because he was the inventor. If so, the patent application should have been filed by Koza. These two presumptions should therefore of necessity have been enforced against Drexler.

Drexler's letterhead shows that he ran a job shop and his letter to Koza of June 2, 1938 shows that Koza got him into the business of making angle drills.

When the inventor goes into such a shop, he goes in alone just as Koza went into Drexler's shop alone and without this rule the manager of the shop and his help can gang up on the inventor and swear him out of Court as Drexler has done to Koza in this case. The failure of the Courts to apply this above rule for the protection of Koza is error.

(7) The Courts failed to recognize that Koza established a confidential relation with Drexler by his disclosure of Exhibit "A" without which Drexler would never have known anything about angle drills and that a contract relation was established thereafter which did not lessen the effect of or change the confidential relation previously established. Under the contract relation Drexler agreed to finance the making of the tools and drills and the search and the application for patent by Koza (88 a) and (125 a) and charge all this against Koza. Drexler changed this contract arbitrarily in September after he had stolen a march on Koza in May by filing an application claiming the invention as his own. The Courts failed to find that this was a breach of confidence. This is error.

(3) The Courts failed to apply the rule that the poverty of the inventor excuses his conduct or laches at critical times which conduct might otherwise be considered negligence or an admission against interest. Koza was poor. Drexler had money and took advantage of Koza's poverty in applying for and taking his patent in the issuing of which the Patent Office blundered and put Koza in a hole and gave Drexler an improper advantage and Koza is not estopped to defend or assert his counterclaim, by his own conduct during the critical years of his poverty which caused his failure to act to protect his own interests either in the Patent Office or elsewhere. This is error.

(9) The Courts erred in dismissing Koza's counterclaim. Drexler admitted that Koza got him into the business. (292 a.) Drexler and Koza made a verbal contract in January 1938 concerning the manufacture and sale of the angle drills. Drexler went back on the verbal contract several months later and has sold 50,000 angle drills up to the date of his testimony, February 19, 1945, (25 a) without stating the price or profit and without denying that he made large profits therefrom as charged in the twelfth paragraph of Koza's counterclaim. This is unjust enrichment and the failure of the Courts to find accordingly is error.

ARGUMENT.

(1) Findings Not Reviewed.

(1) The first error assigned speaks for itself. Whatever errors of commission or omission that were made by the Lower Court were repeated by the Court of Appeals. The Lower Court sneered at Koza's poverty. It minimized the cost of an Interference. It quoted from the Argument of Drexler's attorney in a way that made him a wit-

ness for his client on an item that charged Koza with suspicion about the alleged appearance of the circle on Exhibit "A" on which Drexler's attorney could not be cross examined, and on which the record is silent. It ignored Exhibits "G" and "I" which are Koza's advertisements announcing Koza's angle drills, which advertisements were prepared by Koza with the approval of Drexler and were sent out prior to February 18, 1938 as shown at the end of Exhibit "I" (91 a). On these items, comment is unnecessary.

It is submitted that the tendency of the Circuit Court of Appeals to literally accept Findings of Fact and the Conclusions of Law of District Courts as it has done in this case should be reviewed by the Supreme Court. That great injustice is done by this policy appears from articles recently published in the Journal of the American Bar Association. (See January 1946 number, page 52 and March 1946 number, pages 131 and 152.)

(2) Sixteen Patents.

(2) The second error assigned is sufficiently set forth in the assignment of errors above specified. It needs no further explanation or argument.

Drexler's attorney had no right to cite the patents and the Court had no right to either assert or assume that the tools shown therein had been commonly employed or known to the trade prior to December 1937, the date of the invention of the patent in suit. No use was proven. Nor did Drexler, his attorney or the Court have any right to ignore the fact that the patents showed wrenches that were hand operated and that the handles for operating them were shown in the patents and the patents did not show angle drills or tools that could be used for angle drills. The placing

of the patents in evidence and the reference given to them by the Court was error.

There is nothing to show that any of the hand operated wrenches shown by these patents have been driven at high R. P. M. but they suggest to your attorney that if the R. P. M.s had been speeded up by a customer by a power drive the need for the ball as a thrust bearing for the two gears would have occurred to the customer long ago as a matter of course, and the ball would have been inserted as a mere matter of mechanical skill. Most anyone could have seen that. This is further evidence that they were never driven at high speed, and that Koza was in a position to make the invention.

(3) Amortize.

Drexler Discredited.

(3) With respect to the third error, the following is submitted. At page 125 a, Drexler testified as follows:

> "My price to him was $10.00 on the first hundred and amortize the tooling."

Later—on the same page he says:

> "After the first hundred it (the price) was $7.50."

Drexler agreed to this on or about January 24, 1938.

On page 125 a, Drexler went a little further than he went on page 43 a where he mentioned the price of $10.00 each for the first one hundred and $7.50 for the angle drills sold after the first hundred, but did not say that the difference was to amortize the tooling.

It is obvious that Drexler needed tools for quantity manufacturing and that the cost of these tools was estimated at $250.00. The word "Amortize" in the Century Dictionary is defined—

> "To extinguish as a debt by means of a sinking fund."

This means that when the tools were made, Koza would be in debt to Drexler to the extent of $250.00 for the tools. Obviously with this arrangement the tools would belong to Koza and not to Drexler when 100 angle drills had been sold and paid for.

The tools included forging dies (25 a). The housing of the drill is a special forging and forging dies were needed for its production and Koza in January, 1938 was charged $250.00 for these dies.

This is consistent with Koza's testimony. Koza at the bottom of page 85 a says that Drexler was to bill Koza at from $6.00 to $7.00 a tool and Drexler was to do the collecting and remit to Koza the difference between $6.00 and $7.00 and Koza's selling price which, according to Koza, was $15.00. That, Koza did his own collecting does not alter the fact that there was an agreement on the price to Koza on or about January 24, 1938, as above set forth.

On page 88 a Koza testified that Drexler was to make the search and bill him for it. If Koza was to be billed for the tools, it is only natural that he would be billed for the search as well, and if the search was to be paid for by Koza the cost of the application for the patent would be paid for by him as well.

At page 106 a Koza says that nothing was said about the patent at that time. Later the result of the search was reported to Koza by letter.

The application papers were prepared by an attorney. Drexler could never have prepared those papers himself. They were too well drawn, but no attorney's name appears in connection with the application. Did the attorney prepare the papers for Koza to sign and then did the attorney

refuse to appear in the application when Drexler made the application in his own name? Who was the attorney? The absence of an attorney in the Drexler patent was significant and the significance did not hurt Koza.

The angle drills were, in fact, charged to Koza at $10.00 each, for several months, and during that time they were not charged to the customer by Drexler. While this was the practice there was nothing to prevent Koza from selling them for $15.00 and collecting that amount. If business had been good, doubtless this would have gone on until one hundred had been sold, after which Drexler would have billed them to Koza at $7.50 each.

Possibly no controversy would have arisen if the drills had sold fast, but sales were slow. Koza was in California and broke and Drexler was in Indianapolis and apparently well financed. On May 7, 1938 he filed the application in his own name and took the law into his own hands. Drexler wanted to sell drills and they would sell faster at $10.00 each than they would at $15.00 each, but wasn't quite ready to insist on the price of $10.00 until September. In the meantime he kidded Koza along and on June 2, he wrote Koza:

> "As you were the party that interested us in getting into this business I want to continue to be fair with you, as I have in the past."

(See 292 a.)

Koza played along with Drexler, willing to be shown fair treatment but there was no fair treatment and in September, Drexler offered the contract which Koza refused to sign because Drexler would bill the customer direct with $10.00 each and allow Koza 10% when Koza was getting a commission of 20% and 30% from other manufacturers that he was representing and who were under no special obligation to Koza. (See bottom of page 120 a.)

The proposed contract was followed by Drexler's telegram of September 6, 1938, Exhibit S., 298 a and Drexler's letter of September 21, 1938, page 285 a and Drexler's letter of September 30, 1938 which read:

> "Would appreciate a word from you as to what you intend to do about sales of our unit".

Koza did not answer any of these.

If Drexler's contention is correct that Koza was to sell the angle drills to the customers for $10.00 each, then Koza would have to sell the first one hundred drills without any commission to himself. The commission of $2.50 would be held by Drexler to pay for the cost of the tools. This makes Drexler's contention an absurdity. It is all the more absurd because Drexler knew that Koza was poor. He testified that he could not get any good Commercial Agency report on Koza. (56 a and 285 a.)

If on January 24, 1938, Drexler intended to apply for and take out the patent in his own name, then the charge against Koza of $250.00 to amortize the cost of the tools was dishonest, because it would charge Koza for the cost of the tools which Drexler would own, and which would remain in the possession of Drexler and which Koza could not use without Drexler's consent.

If on January 24, 1938, Drexler understood that Koza was the inventor and would apply for the patent, then the charge of $250.00 for amortizing the cost of the tools was proper, but in that case, it was dishonest for Drexler later to file the application and take out the patent in his own name. Either way that this item of the evidence is looked at, it shows that Drexler is open to suspicion or is dishonest

What then becomes of Drexler's credibility?

If on January 24, 1938, Drexler admitted by inference to this extent that Koza was the inventor, then it is not

material what Koza did or failed to do in protecting his rights later on. His poverty explains his failure to act. His letter to Drexler, Exhibit "T" (299 a) asserts that it was his invention. The assertion reads as follows:

"This was my invention and not your invention".

This charge of $250 on January 24, 1938 to "amortize the tooling" could only be justified on the theory that Koza would own the patent and would own the business and would be responsible for its debts, and while Drexler was willing, to some extent, to finance the undertaking to get the trade in his own shop, he would take the least possible risk in doing so. Koza showed himself to be a good salesman in getting Drexler interested to this extent. The depression was still on and Drexler probably needed business as much as Koza needed money and was willing to take some chance.

When the drills were billed to Koza at $10.00 each, Koza could resell them for $15.00 and he says that this was his selling price at the bottom of page 85 a and top of page 86 a. Koza also says at the bottom of page 120 a that he received from other manufacturers a commission of from 20% to 30%. Compare this with 10% specified by Drexler in Exhibit M. All this tends to show that on January 24, 1938 Koza was authorized to sell the drills at $15.00 each. He was to be charged $10.00 for each drill up to one hundred drills and thereafter he would be charged $7.50 for each drill and the special tools that cost $250.00 would therefore belong to Koza, because the cost of them was to be amortized as above set forth.

This statement about Drexler's intention to amortize the cost of the tooling in January 1938 given by Drexler in cross examination indicates that at that time Koza was the boss and that Koza was to take out the patent.

This statement of Drexler far outweighs any inference that can be drawn from Koza's failure to go into a costly interference with Drexler over a year later, which failure is amply explained by Koza's proverty, which made him unable to bear the great expense of the contest.

Referring again to the amortizing of the cost of the tooling this important item was concealed from the Patent Office; yet it should have been disclosed to the Patent Office by Drexler according to Precision Instrument Mfg. Co. vs. Automotive, 324 U. S. 806, 89 L. Ed. 1381. If it had been disclosed to the Patent Office the Interference would have been declared and Drexler's patent would not have issued, because Koza filed his application on January 23, 1939, twenty-nine days before Drexler's patent issued. That would have placed the parties on more equal terms.

In the opinion in the District Court under the head of DISCUSSION the Court in referring to Exhibit "A" makes this statement:

> "It contained a clear and undimmed circle. According to Koza's testimony it had been placed upon the blue print about six years before the day the paper was offered in evidence. The plaintiff remarked upon the clear outline of the circle, as exhibited at the trial, on a paper six years old and which had been handled considerably in the meantime. He asserted that the very perfection of it should excite suspicion and should be considered in connection with plaintiff's claim that it had not been placed on the blue print when exhibited to Drexler and Morgan."

The Judge was clearly misled as to the materiality of the 16 patents introduced by Drexler and he could have been misled as to the status of the circle on Exhibit "A."

No such statement attributed to plaintiff or "plaintiff remarked" appears in the record. This information must

have been given to the Court in the argument of Drexler's attorney. The circle does not appear clear and undimmed on Exhibit "A", but on the contrary it was very indistinct when Exhibit "A" was offered in evidence and still is indistinct. There was no occasion for handling Exhibit "A" after Morgan made his drawing of January 24, 1938. There was no perfection in the appearance of the circle on Exhibit "A" when it was put in evidence at the hearing. If the Judge was influenced or misled by the argument or statement of Drexler's attorney; so much the worse for the Judge.

Exhibit "A" is a blue print made from Exhibit "B". Exhibit "B" is a drawing made on white paper and the lines of the drawing thereon were made with a hard pencil, such as is ordinarily used in drafting. Hard pencils make lines that are too narrow and too faint to blue print, therefore, in order to make blue prints therefrom, the white paper of Exhibit "B" was laid on a sheet of carbon paper and the carbon paper impressed or marked on the back of Exhibit "B" heavy black lines. That is why the blue print, Exhibit "A", is so clear and strong, in spite of the fact that the lines penciled on the front of Exhibit "B" are faint.

Koza, in his letter of September 28, 1939, described how he sketched the ball on Exhibit "A". That part of the letter reads as follows:

> "While in conference with Morgan I took a pencil and showed where the ball could be placed in the corner of the housing between the two gears, for the purpose of taking up the thrust of both gears."

On page 80 a, near the bottom, Koza testified as follows:

> "I bent over the drafting board along side of Morgan and picked up a pencil and drew this ball in there, and I asked him 'What do you think of this idea of a ball to take up the thrust and prevent the gears from crowding into each other?' "

If Koza picked up a drafting pencil, he obviously made a circle on the blue print that was faint, just as appears on the blue print now, similar to the lines penciled on the front of Exhibit "B". The assertion in the opinion at the top of page 161 a that Exhibit "A" "contained a clear and undimmed circle" is error, and plaintiff's remark also referred to about "the clear outline of the circle" is error, for no ordinary black pencil will make a clear outline on a blue print. Plaintiff's statement in the opinion that the paper six years old had been handled considerably in the meantime is error. There is no evidence to that effect. Morgan made a new drawing in January, 1938 and thereafter Exhibit "A" was not needed for any business purpose.

A copy of the blue print, Exhibit "A", is attached to the brief herewith and the Court can mark a circle on the blue print between the two gears with a hard pencil, and it can see for itself how dim a black mark appears on a blue ground. Use pencil marked H or VH.

As Drexler's attorney is quoted in substance as a witness in the decision it is proper to inquire into the ethics of Drexler's attorney; namely, Ralph G. Lockwood.

For this purpose, the attention of the Court is called to the decision of the Court in Miller vs. Wurlitzer, 48 F. S. 772. In that case, it appears that Miller lived in California. At the invitation of the Wurlitzer Company he came to North Tonawanda and disclosed his invention to the representatives of the Wurlitzer Company, which included Ralph G. Lockwood; the same Ralph G. Lockwood, who has appeared for Drexler in the Lower Courts in this case. Attorney Lockwood then prepared an application for a patent for the Wurlitzer Company and filed it in the Patent Office. The application was signed and sworn to

by the so-called inventor, Lannerd. The drawings show the signature of Lockwood's firm; namely, Lockwood, Goldsmith and Galt as it was in September, 1938. Koza makes profert of these papers.

On this application patent #2,214,468 issued September 10, 1940.

The decision recited the fact that Miller submitted to the Wurlitzer Co. in confidence copies of two patent applications and on January 7, 1938 entered into a written agreement granting to the defendant an option to secure an exclusive license under the patent applications and patents issued thereon. Thereafter the decision reads as follows with reference to Attorney Lockwood, patent counsel for the Wurlitzer Co.

> "The option expired July 7, 1938. Thereafter patent counsel for the defendant prepared an application for letters patent describing and claiming many of the inventions and improvements disclosed in confidence by the plaintiffs and in the same application described and claimed certain inventions of one Lannerd, an employee of the defendant, and certain non-inventive improvements on plaintiffs' inventions devised by Lannerd."

After the patent issued to Lannerd on September 10, 1940 Miller brought suit in the Western District of New York, demanding the transfer of the patent. The decision is written by Judge Burke of Rochester, New York in answer to Lockwood's motion to dismiss the suit, which answer alleged no cause of action. The Court held that there was a cause of action and denied the motion. This Court should take judicial notice of the fact that the Lannerd patent was later assigned to Miller and a Disclaimer was entered in the patent which reads as follows:

> "2,214,468—Paul U. Lannerd, North Tonawanda, N. Y. Projection Device. Patent dated September 10, 1940. Disclaimer filed July 3, 1943, by the inventor.

> Hereby enters this disclaimer to claims 1, 5, 15 and 17 of said patent."

This disclaimer was published in the Official Gazette of the U. S. Patent Office, July 20, 1943, where everyone may read it.

Koza maintains that the Court should take judicial notice of all this in view of Atlantic Fruit Co. vs. Red Cross Lines, 5 F. (2d) 218.

If the Court's opinion in the Wurlitzer case is to be depended upon, then Attorney Lockwood was engaged in a conspiracy to steal the invention of Miller *et al.*, by breach of confidence, which conspiracy was frowned upon by the Court and it is a fair question whether in representing Drexler he has not undertaken to do the same thing to Koza as Koza charged. Was the lower Court misled by him? The word "steal" is used advisedly because the Supreme Court uses it in Board of Trade of the City of Chicago vs. Christie, 198 U. S. 236, 49 L. Ed. 1031.

Can an attorney repeat such fraudulent conduct indefinitely and still keep his standing? Can the Courts continue to rely on such attorneys?

In Hazel-Atlas Glass Co. vs. Hartford, 322 U. S. 238, 88 L. Ed. 1250 at page 246 the Court said:

> "The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud".

and at page 252, Justice Roberts with the concurrence of two other Justices said:

> "It is complained that members of the Bar have knowingly participated in the fraud. Remedies are available to purge recreant officers from the tribunals on whom the fraud was practiced".

The foregoing evidence goes to the credibility of both Drexler and his attorney and shows that neither one of them is to be trusted. As soon as Drexler found that Koza was poor and would continue poor because the drills were not selling well on the Pacific Coast, Drexler began to scheme to oust Koza and get the whole business into his own hands.

Drexler's testimony attempts to rebut Koza largely blackguards Koza for Koza's failure to protect his own interests in 1939, and 1940 during all of which time Koza was poor and helpless, and for which poverty Drexler was largely responsible. Mason vs. Crosby, 16 Fed. Cases 1025.

In Ambler vs. Shipple, 87 U. S. 546, 22 L. Ed. 403, 90 U. S. 278, 23 L. Ed. 127, the Supreme Court has passed on a similar case of fraud. Both decisions were against Whipple, the malefactor of great wealth and in favor of Ambler.

In the first decision above referred to the Court asserted there was an abuse of confidence. The patent issued to the wrong party, who made large profits. The Court ordered Whipple to disgorge half the profits, reversing the lower Court.

Near the end of the second decision the Court with regard to Whipples' contention said as follows:

> "All this is only in aid of the theory on which Whipple (Drexler) has rested his case and lost it; namely: that because Ambler (Koza) was a very bad man, a drunkard and convicted felon, that he, his trustee, and partner could take to himself all the benefit of Ambler's (Koza's) skill and labor, disregard his double relation as trustee and partner and violate every principle which governs these confidential relations".

(Drexler and Koza inserts ours.)

It is to be regretted that the Court should not give Koza credit for the well established fact that he was poor and his poverty forbid him from acting to protect his interests in 1938, 1939 and 1940. The Court has joined in Drexler's hue and cry against a half starved inventor whose condition was aggravated by the depression. Twice the Court refers to Koza's counsel, as though he should have acted for nothing. There is no evidence to show that Eric Ischinger, who appeared as attorney in Koza's application was an attorney at law and was licensed to practice in the Courts. The Court's assertion that the burden of an Interference proceeding could not have been heavy is untrue. An Interference proceeding is like a suit in equity and it is a well known fact that the cost of litigating the Interference in 1939 and 1940 would have been much the same as trying this infringement suit or at least trying that part of the suit that is included in Koza's defense and counterclaim. The cost of litigating the Interference up to the first decision on the merits would easily have been over $1,000.00. An appeal would have almost doubled this. Koza could not proceed *informa pauperis* under the judicial code. Those provisions in the judicial code apply only to suits started in the Federal Court. They do not apply to an action started in an executive office.

See *In re* Meta Mattulath, 37 App. D. C. 410, 1911 C. D. 454. 38 App. D. C. 497, 1912 C. D. 490. In the second decision referred to the costs of a patent attorney is quoted at $100.00 a day.

The Court said that Koza "complains that the Patent Office blundered in not declaring an Interference", but he does not say that Koza complains that the Patent Office blundered in not withholding the Drexler patent from issue until the Interference had been declared and disposed

of as it should have done under its Rule 165 in which case Koza would have had a more even break in the Patent Office. It is well settled that after Drexler's patent had been issued, the Patent Office could not cancel it (Rule 93) and the existence of the patent to Drexler would prejudice Koza to his friends and the public in any attempt to get assistance in fighting Drexler. Thanks to the blunder of the Patent Office in March 1939, Drexler could sue Koza for infringement and Koza could not sue Drexler for infringement.

The Court paid no attention to the testimony of Drexler that he intended on January 24, 1938 to charge Koza $250 for the cost of the tools with the inference arising therefrom that this charge would have been dishonest unless Koza applied for the patent. This charge is not mentioned in the proposed contract, Exhibit "M".

Mr. Drexler is the same man that undertook on January 24, 1938 to make $250 worth of special tools for Mr. Koza and let Mr. Koza pay for them at the rate of $2.50 out of the profit on the first 100 tools.

He is the same man that made a search on the invention in his letter of March 29, 1938 wrote to Koza as follows:

> "I * * * find that our type of a design is patentable".

He is the same man who on May 7, 1938 filed the application for the patent in suit.

He is the same man who on June 2, 1938 wrote to Koza:

> "As you were the party that interested us in getting into this business, I want to continue to be fair with you, as I have in the past."

In September 1938 Koza waited patiently for the fair treatment. His fairness framed up a cut-throat contract with commissions cut to 10% that put Koza out of business.

He is the same man who has brought his suit against Koza to put him out of business and who on February 19, 1945 testified that he had sold 50,000 angle drills without stating the price thereof or his profits thereon. This is Drexler's idea of fairness with which Koza was to be treated as set forth in his letter of June 2, 1938.

He did not intend or expect to do this on January 24, 1938 when he agreed to amortize the cost of the tooling, but a month or two later, when Koza was in California and he couldn't get good commercial agency reports on him, he saw his chance to swindle Koza and started out to do it step by step. Drexler is capable of doing anything to promote his own interests and his attorney, Lockwood, has worked with him very consistently.

More can be said about the excess of zeal of the Judge who wrote the decision, if it is necessary to do so.

In view of the foregoing, it is submitted that the Lower Courts erred in holding that Koza was discredited, that there was no confidential relations between the parties and in holding that Drexler was the inventor and that the Drexler patent was valid and it is submitted that the Lower Courts should have found that Koza disclosed the invention to Drexler and established confidential relations with Drexler of which Drexler took advantage, all of which makes the Drexler patent invalid and the Lower Courts should have found that the Drexler patent is invalid and their failure so to do is error.

(4) DuPont vs. Masland.

The Lower Court failed to apply the decision of DuPont vs. Masland, 244 U. S. 100, 61 L. Ed. 1016 to the facts of this case. This decision does not construe a statute but applies

the common law to a set of facts. At 12 C. J., page 179 on the subject of "Common Law" the text reads as follows:

> "It is fundamental with the common law that it is not fixed and immutable, but is flexible so that it is always adapted to meet new and unexpected conditions."

The decision of DuPont vs. Masland, was made in a case that was brought from the Circuit Court of Appeals of the Third Circuit. The decision in the Third Circuit contains the following statement at page 693:

> "If the formulas are in reality trade secrets they are entitled to protection, if in fact they are already well known, the defendant has a right to use them freely. The truth upon this subject is therefore the very first fact to be determined, and the Court could not evade that duty even if it so desired."

In answer to this, the Supreme Court said as follows:

> "The case has been considered as presenting a conflict between a right of property and a right to make a full defense; and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defense are adjudged against him before he has a chance to be heard or to prove his case. We approach the question somewhat differently.
>
> The word 'property' as applied to Trade Marks and Trade Secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiff have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations".

Koza disclosed Exhibit "A" to Drexler, primarily for the purpose of employing Drexler to make some bevel gears for him. In disclosing Exhibit "A" he disclosed the whole angle drill. If Koza did not suggest the ball it is not material. Drexler had never seen an angle drill before. It was new to him. The record shows that Drexler knew nothing about angle drills or ball bearings until Koza showed him Exhibit "A".

At the top of page 23 a, Drexler testified as follows:

> "He, (Koza) confided in him (Morgan) that he was looking for a source to manufacture an angle drill attachment to take care of the aviation trade; and he told Mr. Morgan and showed him what he had in mind."

That is, Koza showed Morgan Exhibit "A", and according to Drexler's own statement he showed it to him in confidence.

In view of the ruling in DuPont vs. Masland, Koza submits that this established confidential relations.

This question is discussed at length in an article entitled "Problems Arising on Submission to Corporations of Patentable or Non-patentable Ideas or Inventions" published in Temple Law Quarterly January, 1946, page 318—Reprinted in Journal of the Patent Office Society June 1946, page 401.

In Becher vs. Contoure Labs., 29 F. (2d) 31, 32 the Court of Appeals of the Second Circuit said as follows:

> "But the idea may have been obtained under circumstances which forbid the borrower to make use of it for his own benefit".

Citing DuPont vs. Masland.

DuPont vs. Masland is cited in Allen-Qualley vs. Shellmar Products by the District Court in Chicago, 31 F. (2d)

293 at 296. The Court quotes both from DuPont vs. Masland and from Board of Trade vs. Christie, 198 U. S. 236; 49 L. Ed. 1031. Allen-Qualley licensed Shellmar Products to use a trade secret and had disclosed the trade secret to them. Shellmar Products was not an ordinary employee. After receiving the trade secret, Allen-Qualley had searched the records of the Patent Office and found the Olsen patent wthich dominated the alleged trade secret. Both the Lower Court and the Court of Appeals at 36 F. (2d) 63 compelled Shellmar to assign the Olsen patent to Allen-Qualley because of abuse of confidence.

The Court of Appeals in Allen-Qualley vs. Shellmar said:

> "The consensus of authority is that by its inequitable conduct, appellant has precluded itself from enjoying the right of the general public to the patent disclosure".

Citing DuPont vs. Masland. See 87 F. (2d) 108.

DuPont vs. Masland is cited in Booth vs. Stutz at 56 F. (2d) 962, 966. In that case, Booth disclosed certain drawings of blue prints to Stutz for the purpose of interesting Stutz in the invention. There was no relation of employer and employee. Stutz was held to have violated the confidence.

DuPont vs. Masland is cited in A. O. Smith Corporation vs. Petroleum Iron Works, 73 F. (2d) 531, 539. The Court quotes:

> "The property may be denied, but the confidence may not be".

At page 538, this decision cites Board of Trade vs. Christie, 198 U. S. 236, 49 L. Ed. 1031. It quotes Justice Holmes:

> "It stands like a trade secret. The plaintiff has a right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might does not authorize them to steal the plaintiff's."

DuPont vs. Masland is cited in Sadlin vs. Johnson, 141 F. (2d) 660, 661. The text reads as follows:

> "The Rule in Missouri as well as generally is that, though a trade secret be unpatentable, it will nevertheless be protected from use of disclosure by the one to whom it has been revealed in confidence."

Citing eight cases, among which is Smith Corp. vs. Petroleum, *supra*. It also cites restatement of "Torts", sec. 757, Comment B. as follows:

> "A trade secret may consist of any formula, (process) pattern, device or compilation of information which is used in one's business, and which gives him opportunity to obtain an advantage over competitors, who do not know or use it."

DuPont vs. Masland is cited in the case of Gilbert vs. General Motors, 32 FS 502, 504 together with Booth vs. Stutz, Shellmar Products vs. Allen-Qualley and Hoeltke vs. Kemp, 80 F. (2d) 912. The decision holds that Gilbert's pleading, which alleged a breach of confidence, set forth a cause of action and the Court refused to dismiss the complaint.

DuPont vs. Masland is cited in DePhillipis vs. Chrysler Corp., 53 FS 977, 980. By way of showing that the disclosure need not amount to an invention the Court said:

> "The subsequent granting of a patent added nothing to the cause of action".

DuPont vs. Masland is cited in Schavoir vs. American Rebonded Leather Co., May 20, 1926, 104 Conn. 472, 475; 133 Atl. 583. In that case it appeared that in 1859 a Goodyear patent was issued on a certain process. Plaintiff had disclosed to defendant substantially the process of this patent and defendant contended that plaintiff had no property right in the formula of that patent. The Connecticut Court cited the ruling of Justice Holmes above quoted;

namely, the word "property" as applied to Trade Marks and Trade Secrets, etc. * * * The property may be denied, but the confidence cannot be etc."

The Connecticut Court finally goes on to say:

> "It was open to anyone to use the same process provided they came by the necessary knowledge fairly." "Citing many decisions."

The substance of the decision is to the effect that the defendant could not avail himself of the disclosure of the Goodyear patent because he first learned of it from the plaintiff.

DuPont vs. Masland is cited in Young String & Wire Corp. vs. Fall, 293 Mich. 602; 292 N. W. 502. It is cited there in connection with Becher vs. Contoure Labs., 29 F. (2d) 31. Fall had taken out a patent fraudulently. The corporation sued. The Lower Court dismissed the Complaint. The decision reverses the Lower Court.

DuPont vs. Masland is cited in Hollywood Motion Picture Equipment vs. Fuerer, by the Supreme Court of California, 105 Pac. Rep. 299, 302.

The paragraph that precedes the citation is important—in part reads as follows:

> " 'Thou shalt not steal' applies with equal force of propriety to the industrials of a complex situation as to a simple herdsman of ancient Israel. Where a bailee of an article has accepted it under definite terms to hold it and to use it for the benefit of the bailor, a confidence has been reposed which should remain inviolate".

DuPont vs. Masland is also cited in LaChapelle vs. United Shoe Machinery Corp., 272 Mass. 465, in which case many other decisions are cited.

It would seem that in all of these cases that if any of these Courts had before it the disclosure of Koza's Exhibit "A", it would have applied the rule against Drexler regardless of whether the Court found that Koza disclosed the ball or not.

They certainly would have found that Koza disclosed the ball in view of the fact that Drexler on January 24, 1938 intended to charge Koza $250.00 for tools that Koza could not use, if Koza did not own the patent.

The Rule stated in DuPont vs. Masland is a specific application of a much broader rule that has been stated many times elsewhere. Some of these cases will now be referred to.

In Baker Oil Tools vs. Burch (patent case) 71 F. (2d) 31 at page 37, the Court says as follows:

> "Judge Hare, in his note to Leading Cases in Equity, 62, lays down this rule, applicable here:
>
> 'Whenever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated'."

In Trice vs. Comstock, 121 Fed. R. 620, the first headnote reads as above quoted.

In Iroquois Iron Works vs. Krause, 241 Fed. R. 433, at page 441, the Court quoted the above from Trice vs. Comstock, *supra,* and at page 442 ruled as follows:

> "The principle of the rule is stated to be that the fiduciary shall be under no temptation to misuse his power, his knowledge of the situation, and the confidence to which his position entitled him, to the injury of his principal, because if he may use these advantages

> of his position for the benefit of a relative, an employer, an employe, or a partner, it is idle to prohibit him from using them for his own individual advantage."

Attention is also called to the second headnote of this decision.

In the case of Liquid Carbonic vs. Goodyear, 38 F. S. 520, the 4th and 5th headnotes are of pertinence in this particular case for certainly Koza taught Drexler practically all that he ever knew about angle drills and Drexler even admitted his obligations to Koza therefor.

In New Era Electrical Range Co. vs. Sarrell, 252 N. Y. 107, 112, 169 N. E. 105 the Court ruled against Sarrell in substantially the same way as the Courts ruled against Becher and for substantially the same reasons (See Becher vs. Contoure Labs., 279 U. S. 388, 73 L. Ed. 752).

In Liquid Carbonic vs. Goodyear Tire & Rubber Co., 38 FS 520, the Court ruled as follows:

> "In the case of Allen Qualey Co. v. Shellmar Products Co. D. C., 31 F. 2d 293, 296, the court said: 'The question is not one of contracts, of patents, or of professional conduct of counsel. It is a question of the validity in equity of the acts of defendant in receiving in confidence, pending making contractual relationship, under an agreement to treat the same as confidential, a disclosure of the plaintiff's secrets, using such disclosure to locate a patent'. And the court at page 297 of 31 F. 2d held: '* * * the patent itself is therefore imbued with a trust relationship. That the court has the jurisdiction to compel the surrender of the said patent to the plaintiff upon repayment to the defendant of the purchase price expended by it seems to follow from the reasoning of the United States Circuit Court of Appeals in National Wire Bound Box Co. v. Healy (7 Cir.), 189 F. 49.' Baker Oil Toole v. Burch, 10 Cir., 71 F. 2d 31; Murjahn v. Hall, C. C., 119 F. 186."

The Court dismissed the petition for rehearing.

The case of Kelley-Koett Mfg. Co. vs. McEuen is reported at 130 F. (2d) 488. The seventh headnote of that decision reads as follows:

> "In action for breach of confidential relations in using disclosures of improvements later covered by patent, where trial court disbelieved testimony that developments incorporated into infringing machines were arrived at independently, but record failed to disclose trickery or cajolery, and plaintiff derived much information and tangible benefits from alleged confidential relationship, defendant would be charged with same royalties or profits for machines manufactured before the patent issued as after."

The case of Saco-Lowell Shops vs. Reynolds is reported at 141 F. (2d) 587. The seven headnotes from 20 to 26 inclusive are all material. Three of these headnotes are quoted as follows:

> 21. "Where licensee and licensor agreed to work together for developing and marketing of the licensor's invention, there was a confidential relationship in light of which rights of parties were to be determined."
>
> 25. "Ordinarily, where an invention is disclosed to one who, in breach of confidence thus reposed, manufactures and sells articles embodying the invention, the manufacturer is liable for profits and damages resulting therefrom."
>
> 26. "Where inventor of improved process of cotton roving machines covered by patents Nos. 1,738,796 and 2,238,659 granted license and worked with licensee in joint enterprise of developing machine for market, and licensee obtained patent No. 2,187,830 embodying ideas disclosed by licensor and appropriated by licensee in breach of the confidential relationship existing between the parties, the licensor was entitled to licensee's patent and assignment of patent was properly directed."

A. O. Smith Corporation vs. Petroleum Iron Works Co., is reported at 74 F. (2d) 934. In this case the defendant was not allowed to question the validity of the patent when

sued for infringement because it obtained the information of the so-called invention while it was still a secret process. This decision refers back to A. O. Smith Corporation vs. Petroleum Iron Works, 73 F. (2d) 531. At page 538, the Court said:

> "A process may however be maintained in secrecy and be entitled to equitable protection even though an invention is not present."

Lower down in the same paragraph, the Court ruled as follows:

> "In Board of Trade of City of Chicago v. Christie Grain & Stock Co., 198 U. S. 236, 25 A. Ct. 637, 639, 49 L. Ed. 1031, the plaintiff collected stock quotations, which it furnished its customers. Said Mr. Justice Holmes of its tabulation: 'It stands like a trade secret.' The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's."

The Court's reference to stock quotations is pertinent here because it indicates that Drexler could have gone to Puget Sound and got his information just as Koza did, but he had no right to steal the information from Koza after Koza had brought it to Indianapolis and disclosed it to him in confidence, even though Koza had not improved on the Puget Sound device.

Four of the foregoing decisions are cited with approval in Pickard vs. United Aircraft Corp., 128 F. (2d) 632 at 637.

Six of the foregoing cases are cited with approval in Gilbert vs. General Motors, 32 F. S. 502 at page 504. In that case the Court said as follows:

> "New Era Electric Range Co. vs. Serrell, 252 N. Y. 107, 169 N. E. 105 illustrates the right of the owner of a device to maintain action for wrongful use thereof by another to whom it has been disclosed in confidence even though the patent might be void."

The case of Pennington Engineering Co. vs. Houde is reported at 43 F. S. 698. The same line of argument is used by the Court in this decision in sections 11, 12 and 13 of the decision, and five of the foregoing cases are cited therein.

The case of the Board of Trade vs. Christie, 198 U. S. 936, 49 L. Ed. 1031 has been mentioned above.

In that case Market quotations originated in the Board of Trade and the Court enjoined Christie from getting this information which was neither patented nor copyrighted and using it against the wishes of the Board of Trade.

At page 250, the Court used these words:

> "Apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a Trade secret. The plaintiff has the right to keep the work which it has done or paid for doing, to itself. The fact that others might do similar work, if they might does not authorize them to steal the plaintiff's."

Citing 188 U. S. 239,

> "the plaintiff does not lose its rights by communicating the result to persons, even if many in confidential relations to itself under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

Consistent with this is the case of National Tel. News vs. Western Union, 119 F. R. 294, page 296. The Court said as follows:

> "It is obvious also that if appellants may lawfully appropriate the product thus expensively put upon the appellee's tape and distribute the same instantaneously to their own patrons as their own product, thus escaping any expense of collection, but one result could follow—the gathering and distributing of news as a business enterprise would cease altogether."

The Court recognized in this case that copyright was impossible. It ended this paragraph with this statement:

> "The parasite that killed would itself be killed and the public would be left without any service at any price."

This and many other business enterprises are protected under the common law. See 13 C. J., page 1036 and 1037. Note 23. See also Illinois Commission Co. vs. Cleveland Tel. Co., 119 F. R. 301.

See also International News Service vs. Associated Press, 248 U. S. 215, 63 L. Ed. 211.

The Court's reference to Stock quotations in the Board of Trade case and the Western Union case, etc. is pertinent here because it indicates that Drexler could have gone to Puget Sound and got his information at his own time and expense just as Koza did, but he had no right to steal the information from Koza after Koza had brought it to Indianapolis and disclosed it to him in confidence and in an improved form.

Surely if DuPont and Chicago Board of Trade and Western Union with their millions of capital have a right to have their special information protected just as trade secrets would be protected, Koza also had a right to protection against the abuse of the information which Koza imparted to Drexler when he showed him Exhibit "A".

The poverty of Koza and the inequality of the parties makes it all the more necessary to enforce all the presumptions in behalf of Koza.

Koza employed Drexler because he could make bevel gears, according to Exhibit "A", and whether he showed the ball or not to Drexler or Morgan is immaterial in view of the fact that so far as Drexler knew, Exhibit "A" showed

to Drexler an invention in angle drills or a disclosure that was entirely new to Drexler at the time. The Supreme Court decision of Agawam vs. Jordan, 7th Wallace 583, 19 L. Ed. 177 should be interpreted in the light of these facts and applied to this case for the benefit of Koza, otherwise the bars are let down for every job shop to rob every inventor who comes in to have work done. In this respect, the decision as it stands is a menace to every inventor who must go to others for assistance.

The decision of Agawam vs. Jordan, *supra,* reads in part as follows:

> "Where a person has discovered an improved principle in a machine, manufacture, or composition of matter and employs other persons to assist him in carrying out that principle, and they in course of experiment arising from that employment make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle, and may be embodied in his patent as part of his invention."

So far as Drexler was concerned, Exhibit "A" was an invention and discovery by Koza.

At the top of page 42 a Drexler testified as follows:

> "A. Well, Mr. Koza suggested that you had to keep the gears apart, and, of course, that is what you have to do, and you have to have them in the proper relation to make them operate accurately.
>
> Q. You not only have to keep them apart; you have to keep them together, too, don't you?
>
> A. That is right."

Morgan gives credit to Koza for the same thing in another way at the bottom of page 133 a as follows:

> "Q. Did he discuss with you any question of the danger of an end thrust from the tool end of this appliance?

A. Yes, sir.
Q. What did he say?
A. He said they had not been able to hold the thrust, up to the present time."

In view of the fact that Koza stated the problem, it lends credence to Koza's testimony that he suggested the ball, just as he testified at the bottom of page 80 a.

In this connection, attention is called to the decision of Riney vs. Thomas, 77 F. (2d) 525. The claim in controversy is set forth at page 527. The novel part of the claim is in italics, and the words in italics correspond to the ball in the combination or the invention in angle drills in controversy. With regard to the origin of this part of the combination the Patent Office held that Riney did not disclose this part to Thomas before Thomas's filing date, but the Court held that this feature

> "was inherent in the conception and disclosure of Riney, and that, therefore a disclosure of the necessity of flattening the groove outwardly carried with it everything that is contained in the italicized language."

The Court therefore reversed the Patent Office, and held that Riney made the disclosure to Thomas.

It is all the more reasonable to apply this precedent as against Drexler, because Koza offered in evidence his Exhibit "U", which was a blueprint of an angle drill showing a ball between the two bevel gears which blueprint is dated 9/28/36 (Page 98 a). In view of this decision of Riney vs. Thomas and Koza's Exhibit "U", Drexler's statements that he would design the angle drills for Koza becomes mere bombast and conceit (23 a and 24 a).

Many decisions have been made that protected disclosures that were not patentable or copyrightable.

In Pidot and Waltman vs. Zenith Radio Corp., 308 Ill., App. 197, N. E. Rep. 2nd Ser. Vol. 31, page 385, headnote 1 reads as follows:

> "One who wrongfully appropriates a new and novel design or invention disclosed in confidence by another for the purpose of sale must answer to the other in damages and for profits realized therefrom; the basis of recovery is breach of confidence and it is not necessary for plaintiff to establish that his design is new and novel as to the entire World."

In Ligett & Meyer Tobacco Co. Inc., 101 Ind. App. 420 194 N. E. 206, the plaintiff, Meyer, submitted to the Company a dialogue for sale which included the words:

"No thanks, I smoke Chesterfields".

The Tobacco Company used it and Meyer then sued the Tobacco Company for breach of confidence, and the jury gave him $9,000.00, which verdict was sustained on appeal.

In view of the foregoing it is submitted that on the admitted facts of this case the Lower Courts erred in holding that there was no confidential relation between Koza and Drexler and that Drexler could appropriate Exhibit "A" and use it for his own purpose without liability to Koza and it was error for the Court in its decision to cite two patents on angle screw drivers, which at best must have rotated at slow speed R. P. M. while angle drills rotate at very high speed; namely, 1700 to 17,000 R. P. M. (95 a).

The proper interpretation of DuPont vs. Masland is believed to sustain Koza's contention as set forth above.

It is therefore submitted that the Lower Courts are in error in failing to find that the disclosure of Exhibit "A" either with the ball or without to Drexler established confidential relations and that Drexler abused the confidential relations, and that the Lower Courts are in error in failing to find in accordance with this, as above set forth.

(5) Presumption No. 1.

(5.) The law is that when there is a dispute to the origin of an invention the presumption is that the invention originated with the one that has had experience in the art.

Koza was experienced in the art of angle drills and he was also experienced in the use of ball bearings. He first became interested in angle tools in 1926 or 1927, at the Naval Aircraft Factory at Philadelphia (See page 73). Prior to coming to Drexler at Indianapolis he had had angle drills with bevel gears made at a shop in St. Paul (72 a), but these did not work right. He had also made Exhibit "C".

In 1935 Koza was at the Puget Sound Navy Yard as described at the bottom of page 79 a and thereafter he made the drawings, Exhibits "A" and "B" which are dated September 6, 1936. These drawings showed improvements on what he had seen at Puget Sound Navy Yard, but no angle drills were ever made from these drawings (77 a) until Drexler made them.

On September 28, 1936 he made a drawing at Baltimore showing an angle drill with a large ball used as a bearing at the junction of the two bevel gears, with two set screws bearing on the ball for the purpose of taking up wear. A blue print of this is in evidence as Koza's Exhibit "U" and is described on page 98 a.

Exhibits "A" and "B" and "U" all show ball bearings.

Koza showed both Drexler and Morgan his Exhibit "C" which is an angle drill that uses spiral gears. Morgan admits the disclosure of Exhibit "C" when Koza first began to talk angle drills in December 1937. His testimony at page 128 a with regard to the first meeting with Koza reads as follows:

"I believe he showed me an offset angle attachment, that I couldn't definitely say we would be interested in building or not—

Q. Just a moment. You mean this tool here marked Defendant's Exhibit 'C'?

A. That is right."

On page 73 a, Koza testified as follows:

"Q. And prior to your seeing Drexler, had you also had gears made of the type appearing here in Exhibit 'C'?

A. Yes, I did."

On page 39 a Drexler testified as follows:

"Q. Did Koza show you a finished tool that day he was there?

A. That there? (Ex. 'C'.)

Q. Just this one?

A. That one, yes, sir."

See also page 36 a.

That Koza understood about ball bearings is shown by his Exhibit "U" and the ball bearings that are shown on Exhibit "A", and by the high speed R. P. M. required.

Drexler and Morgan have admitted that they knew nothing about angle drills.

At page 139 a referring to the time when Morgan first saw Exhibit "A"; namely December 1937, Morgan testified as follows:

"Q. And up until that time neither you nor Drexler had been interested in angle drills in any shape, manner or form, buying or making or selling them?

A. No, sir.

Q. And you had never designed an angle drill before that time?

A. No, sir.

Q. And as far as you know, Drexler had never manufactured any?

A. No, sir."

On page 59 a, Drexler testified as follows:

"Q. Did you manufacture any other tools of any kind prior to this Koza tool?
A. No."

On page 63 a Drexler testified as follows:

"Q. Koza interested you in angle tools?
A. Interested us in producing an angle tool that could be sold.
Q. Yes. He interested you in angle tools—
A. That is right.
Q. (Continuing)—for the first time. The first time you ever paid any attention to angle tools was through Mr. Koza?
A. That is correct."

At the bottom of page 41 a Drexler testified as follows:

"Q. Did anybody raise the question of separating the gears so that they would keep in their proper contact and an angle tool?
A. Yes.
Q. Who suggested that?
A. Well, Mr. Koza suggested that you had to keep the gears apart, and, of course, that is what you have to do, and you have to have them apart in the proper relation to make them operate accurately.
Q. You not only have to keep them apart; you have to keep them together, too, don't you?
A. That is right."

Morgan gives credit to Koza for the same thing in another way at the bottom of page 133 a as follows:

"Q. Did he discuss with you any question of the danger of an end thrust from the tool end of this appliance?
A. Yes, sir.
Q. What did he say?
A. He said they had not been able to hold the thrust, up to the present time."

On June 2, 1938 Drexler wrote to Koza as follows:

"As you are the party that interested us in getting into this business, I want to continue to be fair with you as I have in the past."

There is no evidence to the contrary and it may therefore be safely taken for granted that Koza was the man of experience and Drexler had no experience prior to December, 1937 when Koza called on him.

Under these circumstances the following decisions should apply.

From Alexander vs. Blackman, 26 App. D. C. 541, 1906 C. D. 602, the following is quoted:

> "The invention was in the woodworking art. Blackman was a carpenter. Alexander a clothier, and as he says knew very little about carpentry. Blackman says he had difficulty in making Alexander understand what he meant by a 'dovetail joint' and it was quite natural that Alexander should have asked what it was.
>
> Even when testifying in the proceeding his practical knowledge of a dovetail does not seem to have greatly increased, as his definition that it means 'a joint that spreads like a dove's tail is not one that a man having practical knowledge would give.
>
> The strong probability is that a man having practical knowledge of an art to which an invention belongs is the one who makes the disclosure to the one unskilled in the art. The one asserting the contrary has to overcome the burden. We think that Alexander has failed to overcome the presumption existing against him."
>
> • • • • •
>
> "A careful consideration of all the facts and circumstances connected with the meeting of the two men, of their previous training and occupations, leads to but one conclusion and that is that Blackman is the one who naturally would have made the invention and disclosed it to Alexander.
>
> This presumption is strengthened by the fact that then and there it was arranged that Blackman should make fourteen or sixteen of the blocks and then when made Alexander should test them."

At page 607 of 1906 C. D., the Court said as follows:

> "We have carefully considered the testimony of Alexander and his witnesses as to the alleged prior

> possession of the invention. Unless we can credit Alexander's testimony we cannot credit that of his witnesses. His testimony is the cornerstone of the arch and if it falls the testimony of the others falls with it."

At page 609 of 1906 C. D., the Court said as follows:

> "Alexander's story is plausible, but there is enough in it to cast the gravest doubt upon it. It is a story that could easily be manufactured and we cannot escape the conviction that it is not a truthful statement of facts."

The testimony of Alexander was similar to, but stronger than the testimony in behalf of Drexler. Alexander's testimony was supported by witnesses who appeared to be disinterested. Drexler's draftsman is not disinterested. He is getting a percentage of the profit from the manufacture and sales of the invention. Alexander lost his case because of a presumption that Blackman must have and did make the invention.

The decision in the case of Alexander vs. Blackman was preceded by the decision in Flather vs. Weber, 21 App. D. C. 179, 1903 C. D. 561, to which reference will now be made.

In that case Flather, a carpenter, filed his application on July 5, 1900, and Weber signed the application as a witness thereto. Then Weber, on December 24, 1900; namely, five and one-half months later filed an application on his own account and he was placed in interference with Flather. The invention in controversy was a varnish that could be used on violins. On this, Weber, a violinist, had worked for many years and when the problem was solved Flather filed the application. As set forth in the decision Flather claimed as follows:

> "Flather did not admit that Weber had anything at all to do with the invention or discovery, except to wait upon him, to run errands for him and to stand in the door of the shed to prevent others from intruding.

> "Flather claims that this reduction to practice was the sole result of his own independent experiments and discovery."

In spite of the fact that Weber had signed Flather's application as a witness and then waited five and a half months before filing his own application, the Court held that Flather was not the inventor, but that Weber, the man with experience was. The Court said:

> "We think the evidence in this case abundantly proves that the conception of the invention or discovery was not by Flather but by Weber before Flather was taken into the business and that Flather and Weber simply cooperated in the experiments to reduce the conception to practice."

The Court affirmed the decision of the Commissioner of Patents in favor of Weber, the junior party.

In Lawner vs. Katzman, 64 F. (2d) 128, Katzman did not file his application until Lawner's patent had issued and Katzman, therefore, had to prove his case beyond a reasonable doubt. The Court of Customs and Patent Appeals held that Katzman, because he was the man of experience was the inventor and disclosed to Lawner.

The third headnote reads as follows:

> "When each of two parties to interference claims disclosure to other, presumption favors one who had practical knowledge of art as against one having no such knowledge particularly where technical skill is involved."

The Court made this finding in spite of the fact that Lawner was corroborated by several witnesses.

Near the end of the decision, the Court ruled as follows:

> "Another circumstance proper to be considered is that appellant had no actual experience in the art to which the invention relates, he having been a manufac-

> turer of wearing apparel; while appellee had for some years been engaged in the manufacture of an electrical water heating device covered by a patent to one Martin and had practical experience in electrical construction in connection therewith."

In this decision at page 133, Alexander vs. Blackman, 26 App. D. C. 541, 1906 C. D. 602, *supra,* is cited.

Of like nature is the decision of Martin vs. Rowlay, 33 App. D. C. 487, 1909 C. D. 471, where the Court held that Rowley was the man who was experienced in the art and was therefore the inventor and that Martin, the newcomer in the art was not the inventor.

The foregoing authorities show that in spite of the evidence in behalf of Drexler to the contrary, the presumption is that the invention was made by Koza because he had long experience in the business and because the subject of angle drills was entirely new to Drexler.

It frequently happens in Interference cases that there is but one invention and the question is—Who made it?

In many of these cases the award of priority is given to the junior party, even where the junior party has filed his application after the senior party has secured his patent. In some cases the reduction to practice by the other party was held to benefit the party that disclosed to him.

In Shuman vs. Beall, Jr., 1906 C. D. 710, 27 App. D. C. 324, Shuman had secured the patent, but priority was awarded to Beall who disclosed to Shuman. In this case, the Court of Appeals of the District of Columbia said as follows:

> "We are of the opinion that Beall, Jr. was the original and sole inventor of the subject matter of the issue, and that an attempt has been made to make him the victim of a bold and shrewdly devised scheme to deprive him of his rights thereto."

In Conner vs. Dean, 1909 C. D. 370, 32 App. D. C. 275, priority was awarded to Conner in spite of the fact that Conner had slept on his rights while Dean to whom he had disclosed it gave the invention to the public.

In Summers vs. Clark, 1912 C. D. 523, 38 App. D. C. 537, the Court of Appeals held that Summers was the inventor and disclosed to Clark.

In Rhinehart vs. Gibson, 1912 C. D. 573, 39 App. D. C. 358, Gibson had the invention in 1901 and 1902 and disclosed to Rinehart at a later date; namely, February 13, 1907. Priority was awarded to Gibson. In this case, the Court held:

> "Like fraud, lack of originality is difficult of proof by direct evidence. It can generally only be established from the circumstances of the case."

In Crabill vs. Teeter, 1915 C. D. 78, 43 App. D. C. 10, Teeter filed his application eighteen months after Crabill. Crabill made haste to get into the Patent Office, but priority was nevertheless awarded to Teeter because he disclosed to Crabill.

In LaFleur vs. Harris, 1915 C. D. 140, 43 App. D. S. 388, Harris was the junior party but priority was awarded to him because he disclosed to LaFleur.

In Kelley vs. Reid, 1919 C. D. 167, 48 App. D. C. 264, Kelley was the senior party, but the Court held that he received disclosure from Reid.

In DeForest vs. Richards, 1920 C. D. 175, 40 App. D. C. 257, DeForest was the man experienced in the art and the Court held that Richards received disclosure from him, being present while some tests were made.

In Laughlin vs. Burry, 1921 C. D. 180, 270 Fed. R. 1013, 50 App. D. C. 273, Laughlin applied for a patent four

months after Burry's patent issued. The Court held that Laughlin was the inventor, the decision in part reads as follows:

> "The conspiracy of Turner and Terry to repudiate their contract and to appropriate to themselves the whole benefit to be derived from this valuable invention, cannot be employed by them to the disadvantage of their victim."

In this case the Court cited authorities as follows:

> "It is well settled that where one conceives an invention and employs another to work out the details of the general conception the result belongs to the employer."
>
> Milton vs. Kingsley, 1896 C. D. 426, 7 App. D. C. 531.
>
> Miller vs. Kelley, 1901 C. D. 405, 18 App. D. C. 163.
>
> Gedge vs. Cromwell, C. D. 1902, 514, 19 App. D. C. 192.
>
> Gallagher vs. Hastings, 1903 C. D. 531, 21 App. D. C. 88, 99.
>
> Flather vs. Weber, 1903 C. D. 561, 21 App. D. C. 179.
>
> Kreag vs. Geen, 1907 C. D. 502, 28 App. D. C. 437.

In the third case cited above Cromwell took out a patent on November 7, 1899 and Gedge filed his application on April 25, 1900. The Court held that Gedge had disclosed to Cromwell, a fiduciary employee, and was the first inventor. Near the end of the decision in this case the Court says:

> "The patent law does not require that one who contracts to experiment on the conception of another and to devise improvements upon it should be regarded as an independent and original inventor."

In the 3rd, 4th and 6th cases cited above the first inventor filed his application after the party to whom he had

made a disclosure had taken out a patent. The late comer had to prove his case beyond a reasonable doubt. Yet priority was awarded to the late comer. In all these cases, the employer was held to be the inventor of any contribution by the employee or claimed by the employee.

In the Kreag case the Court announced the rule as follows:

> "The relation of employer and employee once established, the law is well settled that when one conceives the principal or plan of an invention and employs another to perfect the details and realize his conception though the latter may make valuable improvements therein, such improved result belongs to the employer."

Later in its decision the Court said as follows:

> "The Commissioner held that Laughlin disclosed nothing to Burry that did not belong to the prior art; hence it was immaterial whether Burry was in Laughlin's employ or not; and that Laughlin's actions, after he discovered Burry had applied for a patent were inconsistent with the claim of the existence of a fiduciary relation between him.
>
> "The delay of Laughlin in applying for a patent after Burry's patent was issued creates no presumption in Burry's favor or against Laughlin, since the correspondence discloses clearly that Laughlin was relying upon Turner to enter into a formal contract in pursuance of the oral agreement originally made between them, and, as soon as it became apparent to Laughlin that Turner would not carry out his agreement, he took steps to protect his rights through an application for patent.
>
> "In any event, his application was made four months after the issue of the Burry patent, and this, considering the negotiations he was carrying on with Turner, cannot be held to be an unreasonable delay. It was Laughlin's reliance upon his agreement with Turner and his fiduciary relation with Burry that lulled him into inactivity during the period when Burry was securing his patent."

This describes somewhat Koza's relations with Drexler and if Koza has been guilty of unreasonable delay, it effects only his right to a patent and does not affect his common law right for damages.

In Vidaver vs. Sherman, 1924 C. D. 297, 295 F. R. 994, the Court of Appeals of the District of Columbia held that Vidaver was the inventor and disclosed to Sherman and it made this decision in spite of the fact that Vidaver filed an application in June, 1911 and allowed it to lapse because of his extreme poverty, which was sufficiently proven and in the meantime Sherman got a patent. In this case Vidaver was advised that it was too late to assail the Sherman patent which issued about a month before Vidaver filed his application and that the proper remedy was an action for damages against the Universal Brush Company which action was in fact begun. See also Schumakes vs. Paulson, 1943 C. D. 567, 136 F. (2d) 700. In both of these cases Greenwood vs. Dover, 23 App. D. C. 251 and Gallagher vs. Hastings, *supra,* are cited.

In view of the foregoing authorities and in view of the well established fact that Koza was the man of experience in December, 1937 and that Drexler had no experience in angle drills up to that time, it is submitted that the Lower Courts erred in failing to apply this presumption against Drexler and in favor of Koza and therefore the Drexler patent in suit is invalid.

(6) Presumption No. 2.

It is well settled that where there is a dispute about the origin of an invention as between the proprietor of a job shop and a customer who claims to have brought an invention to the job shop for development, the presumption is

that the invention originated with the customer and not with the proprietor of the job shop.

Drexler's letter head of 1938 is in evidence and contains the following statement:

"DESIGNERS & MANUFACTURERS OF GEARS SPECIAL MACHINERY AND DEVICES"

Koza wanted bevel gears made with involute teeth for his angle drill (74 a).

It is obvious that Drexler ran just the kind of a shop that was looking for the kind of business that Koza could give it and although he was Koza's employee the history of the case shows that he has treated Koza as a victim. This the law says that he must not do; hence the fact that the Courts have established the foregoing presumption.

The presumption is set forth in the decision of Gallagher vs. Hastings, 21 App. D. C. page 88, 1903 C. D. 531. The particular part of the decision that states the substance of the presumption is near the end of the decision and reads as follows:

> "It would be unreasonable to give one who holds himself out as a manufacturer of machines, castings, and other constructions for others, the advantage of position in a claim of invention in any such construction over him who ordered and paid for it; and it is but just that in establishing such a claim he should be charged with the burden of proving that he had not received the general plan or conception from his customer and merely perfected it."

In that case, Hastings filed his application some four months after Gallagher had been issued his patent. Therefore Hastings had to prove his case beyond a reasonable doubt, but with this presumption in Hastings' favor judgment was given for Hastings. If the ruling had been otherwise it would mean that every shop into which an inventor

went for the purpose of getting practical assistance in reducing his invention to practice could swear the inventor out of Court and steal the invention, and the Court of Appeals of the District of Columbia said this must not be done.

This presumption is supported further by the ruling made in Larson vs. Crowther, 1 F. (2d) 761, (See the second and fourth headnotes).

At page 767 of the decision of Larson vs. Crowther, *supra,* the Court ruled as follows:

> "The relation between mechanic and inventor is therefore one of high trust and confidence, and the inventor must be reasonably safeguarded against a betrayal of the faith reposed by him in his employee and against a misuse of information confidentially acquired, etc."

This is quoted at the top of page 408 of Deller's Edition of Walker on Patents together with other cases.

In DeForest vs. Owens, 49 F. (2d) 826 at 829, the Court says as follows:

> "The temptation of the employee to gain knowledge while working under the skilled guidance of another and then to seek to capitalize such knowledge by betraying his trust and seeking the patent for himself is always great and too frequently occurs. The likelihood of such conduct on the part of an employee is always increased where the knowledge of the subject matter is confined to only a few people."

It must be remembered that Koza had been canvassing the trade on angle drills and had been selling angle drills since 1926 and he introduced Drexler not only to the mechanical structure of angle drills, but also to the market for them and Drexler had no right to appropriate either of these sources of information, but he was quick to grab

both and use the information so acquired confidentially from Koza with great benefit to Drexler and with disasterous effects on Koza. That he was barred from using Koza's information about the trade is amply shown at 39 C. J. 127 in which "lists of customers or clients" is mentioned. Citing cases (62). So far as this record shows Koza was the man that kept the angle drill business alive. The 16 patents cited by Drexler on page 66 a do not show angle drills and none of them would compete with Koza.

That there was an agreement between Koza and Drexler is shown by Koza's testimony and by Drexler's letter of June 2, 1938, in which Drexler wrote to Koza as follows:

> "As you are the party that interested us in getting into this business, I want to continue to be fair with you as I have in the past."

Referring again to the decision of Gallagher vs. Hastings, *supra,* attention is called to the fact that Hastings did not file his application until January 4, 1900, whereas Gallagher had procured a patent some four months before that time. The decision so states at the beginning of the decision. Under the circumstances Hastings had to prove his case beyond a reasonable doubt because Gallagher had secured a patent, but because of the superior position of Hastings in that he was the employer and had the preconceived ideas and the experience before he went to Gallagher the decision was given to Hastings.

Gallagher vs. Hastings has been cited with approval in many decisions among which are the following:

In McKeen vs. Jerdone, 34 App. D. C. 163, 1910 C. D. 333, Jerdone took out a patent on December 4, 1906 containing 48 claims. McKeen copied the claims in his application for the same invention filed March 9, 1907. Because McKeen filed his application over three months after Jerdone's

patent issued, McKeen had to prove his case beyond a reasonable doubt. The Court awarded priority to McKeen on these claims, confirming the decision of the Commissioner of Patents.

In Laughlin vs. Burry, 50 App. D. C. 273, 270 F. R. 1013, 1921 C. D. 180, at page 1018 of 270 Fed. R., the Court found as follows:

> "The delay of Laughlin in applying for a patent after Burry's patent was issued creates no presumption in Burry's favor or against Laughlin, since the correspondence discloses clearly that Laughlin was relying upon Turner to enter into a formal contract in pursuance of the oral agreement originally made between them, and as soon as it became apparent to Laughlin that Turner would not carry out his agreement, he took steps to protect his rights through an application for patent. In any event, his application was made four months after the issue of the Burry patent, and this, considering the negotiations he was carrying on with Turner, cannot be held to be an unreasonable delay. It was Laughlin's reliance upon his agreement with Turner and his fiduciary relation with Burry that lulled him into inactivity during the period when Burry was securing his patent.
>
> As soon as Laughlin discovered the scope of Burry's patent he at once insisted upon his rights, both under his agreement with Turner, and by taking steps to assert his claims in the Patent Office. The conspiracy of Turner and Burry to repudiate their contract and to appropriate to themselves the whole benefit to be derived from this valuable invention, cannot be employed by them to the disadvantage of their victim."

In DeForest vs. Owens, 49 F. (2d) 826, 829, 1931 C. D. 589, the applications were probably co-pending. The ruling of the Court about the disability placed upon the employee has been quoted above. The origin of the invention was given to DeForest and the decision cited Gallagher vs. Hastings, Laughlin vs. Burry and several other prior decisions to which reference is made.

In Miller vs. Kelley, 18 App. D. C. 163, 1901 C. D. 405, the Court, near the end of the decision, said as follows:

> "What we hold is that when in the course of experiment by an employer with an invention a device suggested for its improvement which in itself would reach the dignity of independent invention, and a dispute arises between employer and employee as to its conception, the presumption is justly in favor of the employer, and it is incumbent on the employee to overcome that presumption by satisfactory proof."

In this case Koza is the employer and Drexler is the employee, within the meaning of the foregoing decision.

In case of conflict between testimony and presumption the testimony must be clear and strong that outweighs the presumption. For authorities on this point see 64 C. J. 457 under the head of TRIAL and 22 C. J., page 156, under the head of EVIDENCE, Section 88.

In the cases cited the presumption was contradicted by the direct evidence of the losing party, but the presumption prevailed over the evidence of the losing party and his witnesses. Each presumption of the two presumptions should prevail in favor of Koza and the two presumptions, namely,

First, that Koza was the man with the experience, and

Second, that Drexler was the owner of a job shop are cumulative and do not contradict each other. There is no conflict in these presumptions. They support each other, and these presumptions are based on admitted facts of the record.

If the inventor were not protected against being despoiled by the proprietor of a shop to whom the inventor went to have work done, then inventors could be easily robbed by the shop proprietor. All he needs to do is to make a sam-

ple with a few changes and claim the whole thing as his own invention. This must have been and probably still is a frequent and disreputable practice or these decisions establishing these presumptions would not have been made. The shop proprietor can always summon several of his employees to corroborate his testimony while the inventor, on the other hand would be confined to his own testimony and would therefore always be placed at a serious disadvantage against which the presumption is intended to protect him. In such case the inventor would be walking into a trap every time he needed help. If the shop man does not want to accept this handicap, then he should get out of the trap business and should not offer his services to the public.

(7) Disclosure of Exhibit "A" Established Confidential Relations.

7. Koza believes that it is perfectly plain from the evidence that Drexler would never have made an angle drill except that Koza had disclosed Exhibit "A" to him. The admissions of both Drexler and Morgan set forth above on pages 50-60 under the head of PRESUMPTION #1 should settle this question affirmatively in favor of Koza.

Exhibit "A" is a blue print of a drawing that was made by Koza. While it bears some relation to the drawing which Koza saw at Puget Sound Navy Yard on the Pacific Coast, it nevertheless is the product of Koza's work and genius, because it added an extra ball bearing and other changes described on page 80 a which are as follows:

> "I tried to bring this idea down to the point where it would be adaptable to the confined spaces around airplane structural work, in the wings and fuselage and other places in airplanes".

This required an entirely new design. He placed on the drawing Exhibit "A" the specifications that showed what materials should be used. He needed bevel gears with involute teeth. Therefore he disclosed Exhibit "A" to Drexler because Drexler was in the business of making bevel gears and had the particular equipment that could produce the gears that Koza wanted. It was because Drexler had this equipment that Koza made the disclosure, so that he could get bevel gears made with involute teeth. He had tried to get such bevel gears made elsewhere but they were not "cut to the proper form. They made a lot of friction, creating a lot of heat". (See 82 a). The gears would wear out too fast (79 a); so he first inquired of Drexler about having gears made by Drexler as an employee or contractor and in spite of the reservations and the qualifications which Drexler has thrown into the preliminaries with his testimony it was finally agreed between the parties that Drexler would make the angle drills for Koza, and furnish them at a fixed price and charge Koza $250.00 for tools. The housing of the drill is a special forging and needed special forging tools. This agreement must have been reached about January 24, 1938 when Morgan made the drawings of the angle drill with the ball making contact with two gears and the casing. It was then or by that time that Drexler and Koza reached an agreement about the production of these drills.

The decisions heretofore cited under the 4th, 5th and 6th Chapters of this brief all help to establish the fact or the presumption that Koza had made a confidential disclosure to Drexler, prior to that time that got Drexler interested and it was then that Drexler presumptively acting in good faith agreed to make the drills for Koza and at Koza's expense, knowing at the time that Koza could not pay cash but could pay as the business of selling the drills

paid. An agreement was made on that basis. In order to cover the cost of the preliminary work; that is, the making or purchase of the tools such as forging dies and forging jigs, templets, dies, punches, etc. it was fairly agreed between them that these tools would cost $250.00 and the cost of them would be amortized on the first 100 angle drills made and sold. This is the obvious meaning of the testimony of Drexler as set forth on pages 125 a and 25 a; Koza was to pay $10 each for the first 100 tools and $7.50 for the tools thereafter and the difference of $2.50 for each of the first 100 tools; namely, $250.00 in all would amortize the tooling. The definition of "amortize" in the Century Dictionary is:

> "To extinguish, as a debt, by means of a sinking fund."

This definition exactly fits the text and context of the agreement between the parties as to the cost of the tooling and indicates that the whole expense was ultimately to be borne by Koza. This has been commented on above. Koza submits that Drexler would never have made such an agreement if it was understood at the start that Drexler would own the patent. Drexler made this agreement because it was assumed by both parties that Koza made the invention and would take out the patent and was the employer and Drexler would be the employee.

Seven months later Drexler changed the verbal agreement arbitrarily and wanted Koza to sign a written contract which would make Koza the employee, which contract would allow Koza a commission of $1.00 on each angle drill sold against which would be charged losses on open accounts and all collection charges etc. (See 296 a). Koza complained of this (297 a) and refused to sign the contract.

Drexler's record in dealing with Koza in January 1938 starts out fairly and reasonably enough but finally ends up with a dominating attitude that is utterly without conscience and the key to the explanation of this change in attitude is the fact that in January he conceded that Koza was the inventor and Koza would own the patent. Drexler was then content to be Koza's confidential employee, but after Drexler had filed the application for patent in May 1938 claiming the invention as his own, then he asserted the rights of an employer and thereafter tried to dictate to Koza as if Koza was an employee.

This was a breach of confidence and the Lower Courts should have so recognized it. Their failure to do so was error.

The man who could admit at the end of his letter of June 2, 1938 that he was under great obligation to Koza and was under obligation to be fair with him and then could try to gouge him in August or September by the proposed contract, Exhibit "M" and could then bring this suit in which he testifies that he sold about 50,000 of these angle drills, is no model of consistency. He is naturally the type of a man who should always be under suspicion and the Could should have so held. Such a man cannot understand confidential relations and the obligations arising therefrom.

The decision of Miller vs. Wurlitzer, 48 F. S. 772 indicates that Drexler's attorney is no better in this respect.

The failure of the Lower Courts to view these outstanding facts in their correct proportion was error.

(8) Koza's Poverty.

Koza was poor and Drexler knew it. He could not get any good financial report on Koza (56 a and 285 a). Con-

ditions during 1938 and thereafter; namely, until February 21, 1940 were bad and were against Koza. This includes a year from the time the Drexler patent issued; namely a year from February 21, 1939. Koza admitted that he was living from hand to mouth (87 a and 121 a). On cross examination Koza admitted that he left Newark, N. J. in 1939 with probably several thousands of dollars of debts claimed against him by Behrent of Newark, N. J.

During all those years, the country was in a depression. One year after the issuing of Drexler's patent was the last time when Koza could have copied Drexler's claims for the purpose of an Interference. The patent law says so, Code Title 35, Section 51. The time limit expired February 21, 1940. Koza's poverty compelled him to postpone his contest with Drexler. The patent law required him to copy the claims of Drexler's patent within a year from February 21, 1939 (its date of issue) or forfeit his right to a contest with Drexler in the Patent Office.

This law was not enacted for Drexler's benefit nor for Koza's injury, but for the public benefit, it being for the public interest to have all patents on an invention expire as quickly as possible. In this way, the law prevents delay in the issuing of patents. The law would not permit Koza to wait on his own convenience or until he could get money. If he went into the Interference he must go into it promptly and get through with it and issue his patent as quickly as possible; so that his patent would expire in 1958 and not in 1963.

The Courts assume that because Koza could have copied the claims from Drexler's patent at any time within a year from February 21, 1939 and gone into Interference with him, he could have done so and should have done so. The District Court asserts that "the burden of an Interference proceeding could not have been heavy." This is error.

An Interference is like a suit in equity and would cost over $1400 up to and including the first decision on the merits in the Patent Office. It would cost as much more as any special circumstances such as looking up witnesses, travel, brief writing expense, etc. would require. It would necessitate an examination of witnesses, the preparation of a preliminary statement, notice of taking testimony, taking of testimony by deposition of Koza's witnesses at Rochester; for example, cross examination of Drexler and his witnesses at Indianapolis, travel expense, court reporter's fees, printing or duplication of testimony, writing the briefs and argument at Washington in final hearing. All this would have to be done in accordance with Rules of Practice of the U. S. Patent Office; namely, Rules 93-132, 154-163 inclusive. Fifty rules in all. The following is a summary of such probable expense.

Collecting records, correspondence and Exhibits, getting statements of witnesses and preparing and filing preliminary statements (2 days)	$ 100.00
Answering motion to dissolve	50.00
Taking Koza's proofs at Rochester	150.00
Court reporter at Rochester	100.00
Attending the proofs of Drexler at Indianapolis and cross examining of Drexler's witnesses	150.00
Traveling expenses—Koza and attorney to Indianapolis and return	100.00
Writing brief	650.00
Arguing final hearing at Washington and traveling expense of attorney	150.00
	$1,450.00

An appeal would nearly double this cost. In this litigation in the Patent Office, Koza would have no benefit from those sections of the Judicial Code that permit a proverty stricken litigant to sue *informa pauperis*. This privilege

is limited to cases starting in the Federal Courts. It does not apply to cases started in an executive department and appealed therefrom. (See *in re* Meta Mattulath, 37 App. D. C. 410, 38 App. D. C. 497.) In the latter case, the Court noted the fact that the attorney who could have handled the case wanted $100.00 a day for his services. In that case the Court also cited Smith vs. Goodyear Dental Co., 93 U. S. 486, 23 L. Ed. 952. This was a patent case and the last paragraph of this decision reads as follows:

> "The proof respecting his health and pecuniary condition together with his constant efforts to obtain the necessary means to prosecute his right, rebuts all presumption that he ever abandoned actually or constructively either his invention or his application for patent."

See also,

Christie vs. Siebold, 59 F. R. 69,
Callaghan vs. Gouverneur, 295 F. R. 961,
Joy vs. Morgan, 295 F. R. 931,
Dickinson vs. Swinehart, 263 F. R. 474.

In Eclipse Machine Co. vs. Kriger, 15 F. S. 97, Bendix was thousands of dollars in debt, credit exhausted, wrecked financially, etc. and still was held to be diligent from the conception of his invention of 1909 to November, 1913, when he filed his application.

In Wayne vs. Tew, 290 F. R. 311 (Ct. of App. of D. C.) Wayne was broke and the Court held that he was not lacking in diligence because of delay in filing his application.

In Weiss vs. Woodman, 64 F. (2d) at page 279, held that the delay of Junior party was due to the conduct of Senior party who was the appellant who had promised to prepare the specification and drawings to be used by appellee. The Court held that appellant was in no position to urge lack of diligence on the part of appellee.

On February 21, 1940, Koza forfeited his right to contest with Drexler in the Patent Office for a patent, but this forfeiture did not cancel his right to use this invention and/or cancel his right to defend this suit if he was the inventor of this angle drill and disclosed it to Drexler. The forfeiture of Koza's right to a patent did not make Drexler's patent valid, if before that time it was invalid. Section 4920 R. S., U. S. Code Title 35, Sec. 69 gives Koza the right to prove either or both of the "following special matters"

> "Second. That he (Drexler) had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or
>
> Fourth. That he (Drexler) was not the original and first inventor or discoverer of any material and substantial part of the thing patented". (Inserts ours.)

In his letter to Drexler of September 28, 1939 (299 a) Koza made this statement:

> "This was my invention and not your invention".

The letter then recites the circumstances under which the disclosure was made by Koza to Drexler and Morgan late in 1937.

The letter then reads in part as follows:

> "As a practical solution of this situation we can compromise by your assigning a half interest of your patent to me with suitable restrictions.
>
> If we can get together on such basis, I can make contributions to the development of the art that will be worthwhile to both of us."

This get together could best be done by a partnership to which this letter was intended as a stepping stone, in which Drexler could concede priority to Koza on the broad claims and have a patent with the broad claims

issued to Koza, entering a Disclaimer in the Drexler patent. In this way, the cost of an Interference would have been avoided. This would have prolonged the monopoly and would have enabled the partnership to sell the drill of Koza's patent which is a better drill than the one shown in the Drexler patent because it is provided with an adjustment to take up wear.

Drexler did not answer this letter, Exhibit "T" (299 a).

This offer was consistent with what Drexler wrote at the end of his letter of June 2, 1938, Exhibit "D" (299 a), which letter reads in part as follows:

> "As you are the party that interested us in getting into this business, I want to continue to be fair with you as I have in the past."

The assignment of a half interest in the Drexler patent would prevent Drexler from suing Koza for Infringement and this was a sufficient reason for making the offer which was legitimate.

Koza never offered to Drexler or anyone else to lie about the origin of the invention and never offered to conceal the fact that he disclosed to Drexler. He never offered to put over a fraud on the public. He never offered to conceal evidence. He had the same right to make this suggestion to compromise as Contoure Labs. had the right to demand the entire title to Beecher's invalid patent in which demand Contoure Labs. was sustained by the Supreme Court of the United States (279 U. S. 388), 73 L. Ed. 752. If Drexler tries to make it appear that there was anything improper in this demand Koza answers:

> "Evil to him, who evil thinks."

That Koza had rights under the Common Law is shown by Hoeltke vs. Kemp, 80 F. (2d) 912 (June 18, 1935).

As above pointed out, Koza in his letter of September 28, 1939, suggested to Drexler that he assign a half interest of his patent to Koza. In his briefs in both the District Court and the Court of Appeals, Drexler's attorney improperly charged Koza with intent to conceal the fraudulent nature of the Drexler patent if he had been paid this half interest and Drexler's attorney therefore charged that Koza was before the Court with unclean hands. When Drexler's attorney made this statement and this argument in the Court of Appeals the Judges did not question the propriety of this statement, but nodded approval. Koza makes profert of Drexler's briefs, making this charge of unclean hands.

The charge was improper and had no foundation in fact and has no basis in law.

The charge of unclean hands can not be made in a suit at law for damages. It can only be made against the plaintiff in an equity suit and cannot be made against the defendant in any equity suit.

Frank Adam Co. vs. Westinghouse, 146 F. (2d) 165 headnote 7,

Precision Instrument Mfg. Co. vs. Automotive, 324 U. S. 806, 89 L. Ed. 1381, headnotes 2 and 3.

This is an equity suit because Drexler has asked for and obtained an injunction. Koza defends on the ground that Drexler was not the inventor, and this defense is provided for by the patent law, Title 35 Sec. 69 above referred to. This defense is not qualified by any proof that Koza has unclean hands, even if there were such proof. Koza denies the existence of any such proofs.

Koza's counterclaim is an equitable claim and he asserts that he has a right to maintain it in this action because his hands are clean, but even if Koza were guilty as charged

by Drexler, Koza would still have the right to claim damages and have the damages determined at law by a Jury.

This charge against Koza in the Lower Courts was highly improper and should be rebuked by the Supreme Court.

Drexler's arrangement to amortize the cost of tooling to the extent of $250.00 shows that in January 1938 he recognized that Koza was the inventor and this explanation about Koza's poverty is unnecessary, but it has been gone into in detail because it brings out in bold relief Drexler's greed and treachery which took possession of him a few months after January 1938.

For the Lower Courts to fail to recognize this is error.

(9) Counterclaim.

The lower courts erred in dismissing Koza's counterclaim.

Koza made a disclosure of a valuable invention to Drexler under circumstances that he was bound to respect, as a confidential communication. He has abused Koza's confidence. According to his own testimony he has made and sold 50,000 angle drills, and Koza has a right to believe that he has made large profits therefrom. Instead of being directed to account to Koza for these profits, Drexler has secured an injunction against Koza with an order for an accounting and is proceeding against Koza under that order. This is error.

The counterclaim is based on Koza's common law right and the diversity of citizenship of the parties. The Counterclaim does not need to be supported by a patent. Koza is entitled to an accounting for all profits made by Drexler from the manufacture and sale of angle drills during the

period in which Koza has no patent or before Koza's patent could issue. This has been recognized in a number of decisions by the lower courts. It is believed that the question has never been passed on by the Supreme Court and should therefore be passed on in this case.

In Hoeltke vs. Kemp, 80 F. (2d) 912, the Court of Appeals of the 4th Circuit ruled as follows in the 8th headnote:

> "Manufacturer who accepted inventor's offer to disclose his invention, made with view of selling it to manufacturer, held liable for profits and damages on account of infringing devices sold by it prior to grant of patent to inventor, since agreement to hold the disclosed information confidential was implied."

This ruling was substantially followed in McNamara vs. Powell, 273 N. Y. 408, where the court ruled in part as follows:

> "Held that the employer should account to the employee for the profits realized from the sale of such mufflers from the date on which the employer 'finally wrongfully appropriated the muffler' invented by the employee to the date on which the patent was issued to the employee, and that the employee 'should recover the amount of such profits and also the amount expended or incurred by him in defending his rights in the Patent Office, before the Board of Appeals and in the United States Courts'."

In Kelley-Koett Mfg. Co. vs. McEwen, 130 F. (2d) 488, the 7th headnote reads as follows:

> "In action for breach of confidential relations in using disclosures of improvements later covered by patent, where trial court disbelieved testimony that developments incorporated into infringing machines were arrived at independently, but record failed to disclose trickery or cajolery, and plaintiff derived much information and tangible benefits from alleged confidential relationship, defendant would be charged with same royalties or profits for machines manufactured before the patent issued as after."

In Saco-Lowell Shops vs. Reynolds, 141 F. (2d) 587, the 22nd and 25th headnotes read as follows:

> 22. "Wherever one person is placed in such relation to another, by act or consent of that other, or the act of third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."
>
> 25. "Ordinarily, where an invention is disclosed to one who, in breach of confidence thus reposed, manufacturers and sells articles embodying the invention, the manufacturer is liable for profits and damages resulting therefrom."

In the 26th headnote the Court ordered that the licensor was entitled to licensee's patent. An assignment of the patent was properly directed.

Koza had a verbal contract with Drexler for the manufacture of these angle drills and Drexler has violated that contract. First by changing the price by which they were to be furnished to Koza and second by making many thousands of the drills and selling them on his own account without accounting to Koza for any of the profits therefrom. For all this Koza has counterclaim in view of what has been said heretofore and in view of this the decision by the Lower Courts should be reversed and the Court should hold that Koza had made a confidential communication to Drexler, that Drexler had violated the confidence, had unjustly enriched himself thereby and should be required to account to Koza for all the profits of the unjust enrichment.

Koza prays for judgment accordingly.

Rochester, New York, September 17, 1946.

FRANK KEIPER,
Attorney for Petitioners.

EXHIBIT 25.

THE CHAS. DREXLER CO.
Telephone Lincoln 2063
425-427 Harmon Street
INDIANAPOLIS, IND.

September 30, 1938.

Mr. C. A. Koza
Box 6165
Cleveland, Ohio

Dear Mr. Koza:

Would appreciate a word from you as to what you intend to do about Sales of our unit.

Your prompt reply will be appreciated.

Very truly yours,

THE CHAS. DREXLER CO.
CHAS. DREXLER.

CD:EV

DREXLER vs. KOZA

EXHIBITS

Koza has introduced twenty-two exhibits, A to U inclusive. All these exhibits were described and offered in evidence at pages 99a and 100a.

Drexler has offered in evidence twenty-three exhibits and Koza has referred to six of these exhibits in his brief as follows:

Drexler's exhibits 1 and 3 were put in evidence at page 20a Appendix. These are Drexler's patent #2,147,832 (Ex. 1) and Koza's patent #2,229,509 (Ex. 3). They are mentioned on page 3 of Koza's brief. (See also pages 177 and 199 Appendix Exhibit Book.)

Drexler's Exhibit 4 was put in evidence at page 20a Appendix. It consists of certified copy of file wrapper of Koza patent and is mentioned at page 12 of Koza's brief.

Drexler's exhibit 18 was put in evidence at pages 64a and 66a Appendix. It consists of sixteen (16) patents, page 207a—Appendix and is referred to on pages 15, 16 and 21 of Koza's brief.

Drexler's exhibit 24 was put in evidence at page 108a Appendix and is Drexler's letter to Koza of September 21, 1938. It is printed at page 285a Appendix Exhibit Book, and is mentioned at page 24 of Koza's brief.

Drexler's Exhibit 25 was offered in evidence at page 109a Appendix. It is Drexler's letter of September 30, 1938 and is referred to on page 25 of Koza's brief.